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JUDICIAL BRANCH IMPROVEMENTS ACT OF 1987

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 1482

A BILL TO AMEND TITLE 18 AND TITLE 28, UNITED STATES CODE, TO MAKE CERTAIN IMPROVEMENTS WITH RESPECT TO THE FEDERAL JUDICIARY, AND FOR OTHER PURPOSES

MARCH 18, 1988

Serial No. J-100-57

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JUDICIAL BRANCH IMPROVEMENTS ACT OF 1987

FRIDAY, MARCH 18, 1988

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:40 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

Also present: Senator Grassley.

Staff present: Karen Kremer, Sam Gerdano, and Kevin McMahon.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. This hearing will come to order. I apologize for being late, but, as every member of the Senate, we have about 15,000 things to do at the same time, it seems like. I had to be in another hearing on agriculture, so I just got away from that.

We will now begin this hearing on the Judicial Branch Improvement Act of 1987. Our first panel consists of Judge Elmo B. Hunter and Judge Richard M. Bilby. Judge Hunter is a former Chairman of the Committee on Court Administration of the Judicial Conference of the United States, and a district judge from the western district of Missouri.

Judge Bilby is now the Chairman of the Committee on Judicial Improvements of the Judicial Conference of the United States, and chief judge of the U.S. District Court of Arizona.

Before we begin with our first witness, we have a prepared statement of Senator Thurmond and a copy of S. 1482 to place in the record at this time.

[Submissions for the record follow:]

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman, today we are assembled to conduct an oversight hearing on S. 1482, the "Judicial Branch Improvements Act of 1987". This bill was introduced by Senator Heflin at the request of the Judicial Conference of the United States. Contained within the bill are numerous recommendations of the Judicial Conference designed to improve the administration of justice in the Federal courts.

Title I of S. 1482 is identical to S. 952, a separate bill which was voted out of the full committee on December 3, 1987. This measure will convert the mandatory jurisdiction of the Supreme Court to review by certiorari. This legislation will provide the Supreme Court with a greater capacity to control its own docket and to confine its labors to those cases of national and constitutional importance. Abolition of the Supreme Court's mandatory jurisdiction is supported by all the members of the Supreme Court, the Judicial Conference of the United States, the Department of Justice, and the American Bar Association.

Title II of S. 1482 revises some of the technical requirements regarding jury selection and grants the courts greater discretion in carrying out their jury selection duties. Title III authorizes the establishment, on an experimental basis, of court-annexed arbitration in each judicial district with the approval of that circuit's judicial counsel committee. Title IV permits large district courts, those having eight or more permanent judges, to appoint a court executive. The district court executive would perform administrative duties as delegated by district court judges. Title V creates a Federal Judicial Center Foundation which will be allowed to accept and receive gifts and other donations which could be used by the Federal Judicial Center for the purpose of aiding or facilitating the work of the Center. Finally, title VI contains numerous provisions designed to make the judicial process more fair, equitable, and efficient.

I am most interested in these proposals and look forward to hearing from the witnesses that will testify today.

100TH CONGRESS
1ST SESSION

S. 1482

To amend title 18 and title 28, United States Code, to make certain improvements with respect to the Federal judiciary, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 10 (legislative day, JUNE 23), 1987

Mr. HEFLIN (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 18 and title 28, United States Code, to make certain improvements with respect to the Federal judiciary, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Judicial Branch Improvements Act of 1987".

TITLE I—MANDATORY JURISDICTION OF THE SUPREME COURT

SHORT TITLE

SEC. 101. This title may be cited as the "Supreme Court Mandatory Appellate Jurisdiction Reform Act of 1987".

REVIEW OF DECISIONS INVALIDATING ACTS OF CONGRESS

SEC. 102. Section 1252 of title 28, United States Code, and the item relating to that section in the section analysis of chapter 81 of such title, are repealed.

REVIEW OF DECISIONS INVALIDATING STATE STATUTES

SEC. 103. (a) Section 1254 of title 28, United States Code, is amended by striking out paragraph (2) and redesignating paragraph (3) as paragraph (2).

(b) The section heading for section 1254 of such title is amended by striking out "appeal;".

(c) The item relating to section 1254 in the section analysis of chapter 81 of title 28, United States Code, is amended by striking out "appeal;".

REVIEW OF STATE COURT DECISIONS INVOLVING VALIDITY OF STATUTES

SEC. 104. Section 1257 of title 28, United States Code, is amended to read as follows:

"§ 1257. State courts; certiorari

"(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

"(b) For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals.".

REVIEW OF DECISIONS FROM SUPREME COURT OF PUERTO RICO

SEC. 105. Section 1258 of title 28, United States Code, is amended to read as follows:

"§ 1258. Supreme Court of Puerto Rico; certiorari

"Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico or of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.".

CONFORMING AMENDMENTS

SEC. 106. (a) The items relating to sections 1257 and 1258 in the section analysis of chapter 81 of title 28, United States Code, are amended to read as follows:

"1257. State courts; certiorari.
"1258. Supreme Court of Puerto Rico; certiorari.".

(b) Section 2101(a) of title 28, United States Code, is amended by striking out "sections 1252, 1253 and 2282" and inserting in lieu thereof "section 1253".

(c) Section 2103 of title 28, United States Code, is repealed.

(d)(1) Section 2104 of title 28, United States Code, is amended to read as follows:

"§ 2104. Review of State court decisions

"A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States.".

(2) The item relating to section 2104 in the section analysis of chapter 133 of title 28, United States Code, is amended to read as follows:

"2104. Review of State court decisions.".

(e) Section 2350(b) of title 28, United States Code, is amended by striking out "1254(3)" and inserting in lieu thereof "1254(2)".

AMENDMENTS TO OTHER LAWS

SEC. 107. (a) Section 310 of the Federal Election Campaign Act (2 U.S.C. 437h) is amended by repealing subsection (b).

(b) Section 2 of the Act of February 11, 1903, commonly known as the Expediting Act (15 U.S.C. 29), as amended, is amended—

(1) by striking out "(a)" immediately before "Except"; and

(2) by repealing subsection (b).

(c) The last sentence of section 203(d) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1652(d)) is amended to read as follows: "An interlocutory or final judgment, decree, or order of such district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.".

(d) Section 209(e)(3) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 719(e)(3)) is amended—

(1) in the first sentence by striking out ", except that" and all that follows through the end of the sentence and inserting in lieu thereof a period; and

(2) in the second sentence by striking out "petition or appeal shall be filed" and inserting in lieu thereof "such petition shall be filed in the Supreme Court".

(e) Section 303(d) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 743(d)) is amended to read as follows:

"(d) REVIEW.—A finding or determination entered by the special court pursuant to subsection (c) of this section or section 306 of this title shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States. Such review is exclusive, and any such petition shall be filed in the Supreme Court not more than twenty days after entry of such finding or determination.".

(f) Section 1152(b) of the Omnibus Budget Reconciliation Act of 1981 (45 U.S.C. 1105(b)) is amended—

(1) in the first sentence by striking out ", except that" and all that follows through the end of the sentence and inserting in lieu thereof a period; and

(2) in the second sentence by striking out "petition or appeal shall be filed" and inserting in lieu thereof "such petition shall be filed in the Supreme Court".

(g) Section 206 of the International Claims Settlement Act of 1949 (22 U.S.C. 1631e) is amended by striking out "1252, 1254, 1291," and inserting in lieu thereof "1291".

(h) Section 12(a) of the Act of May 13, 1954, commonly known as the Saint Lawrence Seaway Act (33 U.S.C. 988(a)), is amended by striking out "1254(3)" and inserting in lieu thereof "1254(2)".

(i) Section 25(a)(4)(E) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136w(a)(4)(E)) is repealed.

(j) Section 21(f)) of the Federal Trade Commission Improvements Act of 1980 (15 U.S.C. 57a-1(f)) is repealed.

(k) Section 12(e) of the Coastal Zone Management Improvement Act of 1980 (16 U.S.C. 1463a(e)) is repealed.

EFFECTIVE DATE

SEC. 108. The amendments made by this title shall take effect ninety days after the date of the enactment of this Act, except that such amendments shall not apply to cases pending in the Supreme Court on the effective date of such amendments or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date.

TITLE II—JURY SELECTION AND SERVICE AMENDMENTS

SHORT TITLE

SEC. 201. This title may be cited as the "Jury System Improvements Act of 1987."

EXCUSE OF JURORS

SEC. 202. Section 1866(c)(1) of title 28, United States Code, is amended to read as follows: "(1) excused by the court, or by the clerk under supervision of the court if the court's jury selection plan so authorizes, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary, at the conclusion of which such person either shall be summoned again for jury service under subsections (b) and (c) of this section, or, if the court's jury selection plan so provides, the name of such person shall be reinserted into the qualified jury wheel for selection pursuant to subsection (a) of this section,".

JURY SELECTION PLAN AMENDMENTS

SEC. 203. Section 1863(b) of title 28, United States Code, is amended by—

(1) striking out the words "or clerk" in paragraph (3) and inserting in lieu thereof ", clerk or other persons authorized by the court"; and

(2) amending paragraph (6) to read as follows:

"(6) specify that the following persons are barred from jury service on the ground that they are exempt (i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any State, district, territory, possession, or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties.".

MASTER JURY WHEEL AMENDMENT

SEC. 204. The second sentence of section 1864(a) of title 28, United States Code, is amended to read as follows:

"The clerk or jury commission shall possess the capability to prepare upon order of the court an alphabetical list of the names drawn from the master jury wheel. Any list so prepared shall not be disclosed to any person except pursuant to the district court plan and to section 1867 and 1868 of this title.".

TECHNICAL AMENDMENT

Sec. 205. The second sentence of section 1865(a) of title 28, United States Code, is amended by deleting the words "the alphabetical" and inserting in lieu thereof the following, "in any alphabetical".

EXPERIMENTAL JURY SELECTION PROCEDURES

Sec. 206. (a) Chapter 121 of title 28, United States Code, is amended by adding at the end thereof the following section:

"§ 1878. Experimental use of new jury selection procedures

"(a) The Judicial Conference of the United States is authorized to permit district courts to experiment with new jury selection procedures, notwithstanding that such new procedures may be inconsistent with the provisions of this chapter. No such experiment shall be authorized, however, unless the Judicial Conference certifies that the experiment will not violate the policies and objectives set forth in sections 1861 and 1862 of this title, and no such experiment may be conducted for a period of longer than two years. The Judicial

Conference must specify the exact number of district courts to participate in an experiments but in no event shall the number of courts participating in any one experiment exceed ten. The Conference shall terminate any experiment immediately upon determining that the policies and objectives of section 1861 and 1862 are being violated, or whenever in its judgment good cause for such termination exists. Permanent implementation of any experiment may be effectuated only through an amendment to chapter 121 of this title.

"(b) No challenge under section 1867 of this title shall lie on the basis that a jury was selected in accordance with an experiment conducted pursuant to this section.".

(b) The chapter analysis of chapter 121 of title 28, United States Code, is amended by inserting at the end thereof, "1878. Experimental use of new jury selection procedures.".

EFFECTIVE DATE

SEC. 207. This title and the amendments made by this title shall take effect on the date of enactment of this Act.

TITLE III—COURT-ANNEXED ARBITRATION

SHORT TITLE

SEC. 301. This title may be cited as the "Court-Annexed Arbitration Act of 1987".

AMENDMENT TO AUTHORIZE COURT-ANNEXED ARBITRATION

SEC. 302. Title 28, United States Code, is amended by—

(A) adding after chapter 175 the following new chapter:

"CHAPTER 177—ARBITRATION

"Sec.
"3101. Establishment of an arbitration program.

"§ 3101. Establishment of an arbitration program

"A program of court-annexed arbitration may be established, on an experimental basis, in each judicial district by local rule with the approval of the judicial council of the circuit.".

(b) amending the chapter analysis for part VI by adding the following:

"177. Arbitration .... 3101".

JUDICIAL CONFERENCE MODEL PROCEDURES

SEC. 303. The Judicial Conference of the United States may develop model procedures for the conduct of arbitration proceedings under this title.

AUTHORIZATION FOR APPROPRIATIONS

SEC. 304. There are authorized to be appropriated to the judicial branch of Government such sums as may be necessary to carry out the provisions of this title. Such sums are to remain available until expended.

EFFECTIVE DATE

SEC. 305. The amendment made by this title shall take effect on the date of enactment of this Act.

TITLE IV—DISTRICT COURT EXECUTIVE

SHORT TITLE

SEC. 401. This title may be cited as the "District Court Executive Act of 1987".

DISTRICT COURT EXECUTIVE

SEC. 402. Chapter 49 of title 28, United States Code, is amended by redesignating section 756 as section 757 and inserting the following new section 756:

"§ 756. District court executive

"(a) Each district court with eight district judgeships or more may, with the approval of the judicial council of the circuit, appoint a district court executive. The district court executive shall serve at the pleasure of the court.

"(b) A district court executive shall be certified as qualified by the Board of Certification provided by section 332(f) of this title before being appointed under this section.

"(c) The district court executive shall exercise, under the general supervision of the chief judge, such administrative powers and perform such duties as may be delegated to him by the district court, which may include, but need not be limited to:

"(1) Arranging and attending meetings, preparing agendas, and serving as secretariat to ad hoc or standing committees of the judges established for the administration of specific programs or to resolve procedural or policy issues.

"(2) Implementing and insuring compliance with any rules, regulations, or order of the court.

"(3) Reviewing and recommending changes in the local rules, the Jury Selection and Service Act plan, the speedy trial plan, the plan for representation of persons under the Criminal Justice Act, and other internal operating plans of the court.

"(4) Serving as public relations officer and representing the court as its liaison to the courts of the State, bar associations, civic groups, the news media, and other public and private groups having an interest in the administration of the court.

"(5) Administering the court's personnel system in accordance with the Judiciary salary plan and rules and regulations promulgated by the Judicial Conference of the United States.

"(6) Serving as the court's equal employment opportunity coordinator and being responsible for supervising the processing of any discrimination complaints and grievances by court personnel.

"(7) Developing and implementing training programs for court personnel in conjunction with seminars and other education programs conducted under the auspices of the Federal Judicial Center.

"(8) Supervising court reporters and court interpreters and arranging for contractual services as necessary, subject to the approval of the Judicial Council and under such terms and conditions as may be prescribed by the Judicial Conference of the United States.

"(9) Formulating the annual budget of the court for submission to the Administrative Office and the appropriate committees of the Judicial Conference and reviewing and evaluating requests for additional personnel from each of the organizational units of the court to ensure compliance with standards adopted by the Judicial Conference.

"(10) Establishing and maintaining a space management program to ensure maximum utilization of courtrooms and other facilities and serving as liaison officer with the General Services Administration (GSA) and the Administrative Offices with respect to the acquisition of additional space and processing of work authorizations for tenant alterations and other reimbursable services by GSA.

"(11) Assisting in the formulation of the court's security program.

"(12) Serving as the court's furniture liaison officer and being responsible for the apportionment and allocation of funds made available for that purpose.

"(13) Establishing and maintaining property control records and processing requests for general office equipment, lawbooks, and other accountable property.

"(14) Administering the program for the admission of attorneys to the bar and any disciplinary procedures that may be adopted by the court and maintaining a roster and arranging for dissemination of the local rules, opinions, and other material of interest to the bar.

"(15) Conducting studies relating to the business and administration of the court and preparing appropriate recommendations and reports for the chief judge.

"(16) Performing such other duties as may be assigned by the court and the chief judge.

"(d) Each district court executive shall be paid at a salary to be established by the Judicial Conference of the United States not to exceed the annual rate of level V of the Executive Schedule (5 U.S.C. 5316).

"(e) The district court executive may appoint, with the approval of the district court, necessary employees in such numbers as may be approved by the Director of the Administrative Office of the United States Courts. The district court executive and his staff shall be deemed to be officers and employees of the judicial branch of the United States Government within the meaning of subchapter III of chapter 83 (relating to Civil Service Retirement), chapter 84 (relating to the Federal Employees' Retirement System), chapter 87 (relating to Federal employees' life insurance), and chapter 89 (relating to Federal employees' health benefits) of title 5, United States Code.".

SECTION ANALYSIS

SEC. 403. The table of sections of chapter 49 of title 28, United States Code, is amended by deleting the item relating to section 756 and by inserting in lieu thereof new items as follows:

"756. District Court Executive.
"757. Power to appoint.".

EFFECTIVE DATE

SEC. 404. This title and the amendments made by this title shall take effect on the first day of the fiscal year immediately following the date of enactment of this Act.

TITLE V—FEDERAL JUDICIAL CENTER AMENDMENTS

PART A—FEDERAL JUDICIAL CENTER FOUNDATION

SHORT TITLE

SEC. 501. This Part may be cited as the "Federal Judicial Center Foundation Act of 1987".

FEDERAL JUDICIAL CENTER FOUNDATION

SEC. 502. Chapter 42 of title 28, United States Code, is hereby amended by adding at the end thereof the following new section:

"§ 629. Federal Judicial Center Foundation

"(a) There is established a private nonprofit corporation which shall be known as the Federal Judicial Center Foundation (the 'Foundation') and which shall be incorporated in the District of Columbia. The purpose of the Foundation shall be to have sole authority to accept and receive gifts of property, both real and personal, and services made for the purpose of aiding or facilitating the work of the Center. The Foundation shall not accept conditional or otherwise restricted gifts: *Provided, however,* That gifts that are designated for the support of specific projects previously approved by the Board of the Center may be accepted. The Foundation shall have no authority to administer or otherwise determine the use of gifts accepted pursuant to the authority granted in this section.

"(b) The business of the Foundation shall be conducted by a Board that shall have seven members, including a chairman. Three members, including the chairman, shall be appointed by the Chief Justice of the United States, two by the President pro tempore of the Senate and two by the Speaker of the House of Representatives. Terms of office shall be five years, except that the initial terms shall be five years for the

Chairman, one member appointed by the President pro tempore and one member appointed by the Speaker, three years for the other member appointed by the President pro tempore and the other member appointed by the Speaker, and two years for the two other members appointed by the Chief Justice. Members of the Board shall serve without compensation, but, upon authorization of the Director of the Center, shall be reimbursed by the Center for actual and necessary expenses incurred in the performance of their official duties. No person who is a Federal or State judge, in regular active service or otherwise eligible to perform judicial duties, shall be eligible for membership on the Board. The Center shall provide all administrative support and facilities necessary to the operation of the Board.

"(c) The Center is hereby authorized to administer and utilize gifts received by the Foundation under the authority granted in this section. Subject only to the condition that gifts will be used to further Center goals, the Board of the Center shall have sole authority to determine the manner in which gifts shall be used.

"(d) Gifts of money and proceeds from sales of other property received as gifts shall be deposited in a separate fund in the Treasury of the United States and disbursed on the order of the Director of the Center, in accordance with policies established by the Board of the Center.

"(e) The Board of the Foundation shall prepare an annual report to the Committees on the Judiciary of the United States Senate and House of Representatives with respect to gifts received during the year covered by the report under the authority granted in this section, including the source of each such gift, the amount of each gift of cash or cash equivalent and a description of each other gift. The Center shall include in its annual report of the activities of the Center a description of the purposes for which gifts or gift funds were used during the year covered by the report.

"(f) For the purpose of Federal income, estate and gift taxes, property accepted under the authority granted in this section shall be considered as a gift or bequest to or for the use of the United States.".

SECTION ANALYSIS

SEC. 503. The table of sections of chapter 42 of title 28, United States Code, is amended by deleting the item relating to section 629 and inserting in lieu thereof:

"629. Federal Judicial Center Foundation.".

EFFECTIVE DATE

SEC. 504. The amendment made by this part shall take effect on the date of enactment of this Act.

PART B—HISTORY PROGRAM IN THE JUDICIAL BRANCH

DUTIES OF THE BOARD

SEC. 510. Section 623(a) of title 28, United States Code, is amended—

(1) by deleting "and" at the end of paragraph (5);

(2) by deleting the period at the end of paragraph (6);

(3) by adding "; and" at the end of paragraph (6); and

(4) by adding new paragraph (7) as follows:

"(7) conduct, coordinate, and encourage programs to collect, preserve, and make available materials relating to the history of the judicial branch of the United States Government.".

EFFECTIVE DATE

SEC. 511. The amendments made by this part shall take effect on the date of enactment of this Act.

PART C—TRAINING FOR NON-GOVERNMENTAL EMPLOYEES

FUNCTIONS OF THE FEDERAL JUDICIAL CENTER

SEC. 520. Section 620(b)(3) of title 28, United States Code, is amended to read as follows:

"(3) to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the government and other persons whose participation in such programs would improve the operation of the judicial branch, including, but not limited to, judges, United States magistrates, clerks of court, probation officers, and persons serving as mediators and arbitrators;".

EFFECTIVE DATE

Sec. 521. The amendments made by this part shall take effect on the date of enactment of this Act.

Part D—Powers of the Board and Compensation of the Deputy Director

APPOINTMENT OF THE DEPUTY DIRECTOR

Sec. 531. Section 624 of title 28, United States Code, relating to powers of the Board of the Federal Judicial Center, is amended in paragraph (1) by inserting "and the Deputy Director" after "Director".

COMPENSATION OF THE DEPUTY DIRECTOR

Sec. 532. Chapter 42 of title 28, United States Code, is amended by—

(1) adding a new sentence at the end of section 626 as follows: "The compensation of the Deputy Director of the Federal Judicial Center shall be the same as that of the Deputy Director of the Administrative Office.";

(2) by amending the section title to section 626 to read "Compensation of the Director and Deputy Director"; and

(3) by amending the item relating to section 626 in the section analysis of chapter 42 of title 28, United States Code, to read as follows:

"626. Compensation of the Director and Deputy Director.".

EFFECTIVE DATE

SEC. 533. The amendments made by this part shall be effective on the date of enactment of this Act.

TITLE VI—MISCELLANEOUS PROVISIONS

DIVISIONAL VENUE IN CIVIL CASES

SEC. 601. (a) REPEAL OF SECTION 1393 OF TITLE 28, UNITED STATES CODE.—Section 1393 of title 28, United States Code, which provides for divisional venue in civil cases, is repealed.

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect ninety days after the date of enactment of this Act.

REGISTRATION OF FOREIGN JUDGMENTS

SEC. 602. (a) AMENDMENTS TO SECTIONS 1963 AND 1963A OF TITLE 28, UNITED STATES CODE.—Chapter 125 of title 28, United States Code, is amended—

(1) by amending the first sentence of section 1963 to read: "A judgment in an action for the recovery of money or property entered in any district court or in the Court of International Trade may be registered by filing a certified copy of such judgment in any other district, or with respect to the Court of International Trade in any judicial district, when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown.";

(2) by repealing section 1963A;

(3) by amending the title to section 1963 to read "Registration of judgments of the district courts and the Court of International Trade"; and

(4) by amending the chapter analysis relating to sections 1963 and 1963A to read—

"1963. Registration of judgments of the district courts and the Court of International Trade.
"[1963A. Repealed.]".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect ninety days after the date of enactment of this Act.

DIVERSITY IN CASES INVOLVING REPRESENTATIVE PARTIES

SEC. 603. (a) AMENDMENT TO SECTION 1332 OF TITLE 28, UNITED STATES CODE.—Section 1332(c) of title 28, United States Code, is amended to read as follows:

"(c) For the purposes of this section and section 1441 of this title—

"(1) a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

"(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or imcompetent.".

(b) Effective Date.—The amendment made by this section shall apply to claims in civil actions commenced in or removed to the United States district courts on or after the 90th day after the date of enactment of this Act.

BANKRUPTCY JUDGE, MAGISTRATE AND LAW CLERK EXEMPTION FROM FEDERAL LEAVE ACT

Sec. 604. (a) Amendments to Sections 153, 156, 631, 634, 712, 752, and 794, of Title 28, United States Code.—Title 28 of the United States Code is amended—

(1) by adding a new subsection (d) to section 153 as follows:

"(d) A bankruptcy judge appointed under this chapter shall be exempt from the provisions of subchapter I of chapter 63 of title 5, United States Code.";

(2) by adding a new subsection (l) to section 631 as follows:

"(l) A United States magistrate appointed under this chapter shall be exempt from the provisions of subchapter I of chapter 63 of title 5, United States Code.";

(3) by adding at the end thereof the following sentence to sections 156(a), 712, 752 and 794: "A law clerk appointed under this section shall be exempt from the provisions of subchapter I of chapter 63 of title 5, United States Code."; and

(4) by adding at the end thereof the following sentence to section 634(c): "A legal assistant appointed under this section shall be exempt from the provisions of subchapter I of chapter 63 of title 5, United States Code.".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.

COST-OF-LIVING ADJUSTMENT OF ANNUITIES PAYABLE UNDER SECTIONS 611 AND 627 OF TITLE 28, UNITED STATES CODE

SEC. 605. (a) AMENDMENTS TO SECTIONS 611 AND 627 OF TITLE 28, UNITED STATES CODE.—Sections 611 and 627 of title 28, United States Code, are amended by adding at the end thereof a new paragraph denominated as sections 611(e) and 627(f), respectively, reading as follows:

"Each annuity payable under this section shall be increased by the same percentage amount and effective on the same date as annuities payable under chapter 83 of title 5, United States Code, are increased as provided by section 8340 of title 28, United States Code.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to cost-of-living increases that go into effect on or after the date of enactment of this Act with respect to any annuity being paid or becoming payable on or after such date.

MILITARY RETIREMENT PAY FOR SENIOR OR RETIRED JUDGES

SEC. 606. (a) AMENDMENTS TO SECTION 371 OF TITLE 28, UNITED STATES CODE.—Section 371 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) Notwithstanding subsection (c) of section 5532 of title 5, United States Code, if a regular or reserve member or former member of a uniformed service who is receiving retired or retainer pay becomes employed as a justice or judge of the United States, as defined by section 451 of title 28, or becomes eligible therefor while so employed, such retired or retainer pay shall not be paid during regular active service as a justice or judge, but shall be resumed or commenced without reduction upon retirement from the judicial office or from regular active service (into senior status) as such justice or judge.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to a justice or judge who retires, or has retired, from the judicial office or from regular active service (into senior status) as such justice or judge of the United States on or after the effective date of section 5532(c) of title 5, United States Code, and to whom section 5532(c) would otherwise be applicable.

CERTIFICATE OF PROBABLE CAUSE UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE

SEC. 607. (a) AMENDMENTS TO SECTION 2255 OF TITLE 28, UNITED STATES CODE, AND FEDERAL RULES OF APPELLATE PROCEDURE.—Section 2255 of title 28, United States Code, is amended by adding the following new sentence to the end of the sixth paragraph thereof: "An appeal may not be taken from such order unless the justice or judge who rendered the order, or a circuit justice or judge, issues a certificate of probable cause.".

(b) Rule 22 of the Federal Rules of Appellate Procedure is amended by—

(1) striking the division title and inserting in lieu thereof

"Rule 22. Habeas Corpus and Section 2255 Proceedings";

(2) inserting "and in a motion proceeding pursuant to section 2255 of title 28, United States Code," after "State court," in the first sentence in subdivision (b); and

(3) deleting "for the writ" in the fourth sentence of subdivision (b).

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to section 2255 proceedings commenced in the United States district courts on or after the ninetieth day after the date of enactment of this Act.

EXHAUSTION OF STATE REMEDIES UNDER SECTION 2254 OF TITLE 28, UNITED STATES CODE

SEC. 608. (a) AMENDMENT TO SECTION 2254 OF TITLE 28, UNITED STATES CODE.—Section 2254(b) of title 28, United States Code, is amended by adding the following new sentence to the end thereof: "An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect ninety days after the date of enactment of this Act.

AMENDMENTS TO CONFORM SECTIONS 611 AND 627 OF TITLE 28, UNITED STATES CODE TO THE FEDERAL EMPLOYEES' RETIREMENT SYSTEM ACT OF 1986

SEC. 609. (a) AMENDMENTS TO SECTIONS 611 AND 627 OF TITLE 28, UNITED STATES CODE.—Title 28 of the United States Code is amended by—

(1) amending section 611(a) to read as follows:

"The Director may, by written election filed with the Chief Justice of the United States within six months after the date on which he takes office, waive coverage under chapter 83 of title 5, United States Code, subchapter III (the Civil Service Retirement System) or chapter 84 of title 5, United States Code (the Federal Employees' Retirement System), whichever is applicable, and bring himself within the purview of this section. A Director who elects coverage under this section shall be deemed an 'employee' for purposes of chapter 84 of title 5, United States Code, subchapter III, regardless of whether he has waived the coverage of chapter 83, subchapter III, or chapter 84. Waiver of coverage under chapter 83, subchapter III, and election of this section shall not operate to foreclose to the Director, upon separation from service other than by retirement, such opportunity as the law may provide to secure retirement credit under chapter 83 for service as Director by depositing with interest the amount required by section 8334 of title 5, United States Code. A Director who waives coverage under chapter 84 and elects this section may secure retirement credit under chapter 84 for service as Director by depositing with interest 1.3 percent of basic pay for service from January 1, 1984, through December 31, 1986, and the amount referred to in section 8422(a) of title 5, United States Code, for service after December 31, 1986. Interest shall be computed under section 8334(e) of title 5, United States Code."; and

(2) amending section 627(b) following the words "*Provided, however,*" to read as follows: "That the Director, upon written notice filed with the Director of the Administrative Office of the United States Courts within six months after the date on which he takes office, may waive coverage under chapter 83 of title 5, United States Code, subchapter III (the Civil Service Retirement System) or chapter 84 of title 5, United States Code (the Federal Employees' Retirement System), whichever is applicable, and elect coverage under the retirement and disability provisions of this section. A Director who elects coverage under this section shall be deemed an 'employee' for purposes of chapter 84 of title 5, United States Code, subchapter III, regardless of whether he has waived the coverage of chapter 83, subchapter III, or chapter 84. *And provided further,* That upon his nonretirement separation from the Federal Judicial Center, waiver of coverage under chapter 83, subchapter III, and election of this section shall not operate to foreclose to the Director such opportunity as the law may provide to secure re-

tirement credit under chapter 83 for service as Director by depositing with interest the amount required by section 8334 of title 5, United States Code. A Director who waives coverage under chapter 84 and elects this section may secure retirement credit under chapter 84 for service as Director by depositing with interest 1.3 percent of basic pay for service from January 1, 1984, through December 31, 1986, and the amount referred to in section 8422(a) of title 5, United States Code for service after December 31, 1986. Interest shall be computed under section 8334(e) of title 5, United States Code.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to persons holding the offices of Director of the Administrative Office of the United States Courts, Director of the Federal Judicial Center, and Administrative Assistant to the Chief Justice on the date of enactment of this Act.

JUDICIAL DISQUALIFICATION AMENDMENT

SEC. 610. (a) AMENDMENT TO SECTION 455 OF TITLE 28, UNITED STATES CODE.—Section 455 of title 28, United States Code, is amended by adding a new subsection at the end thereof as follows:

"(f) Notwithstanding the foregoing provisions, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance, after the matter was assigned to him, of a party in which he individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest (other than an interest that could be substantially affected by the outcome), a waiver of disqualification may be accepted from the parties; in the absence of waiver, disqualification is not required if the judge determines that the public interest in avoiding the cost of delay or reassignment outweighs any appearance of impropriety arising from his continuing with the matter to completion.".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the date of enactment of this Act.

SERVICE OF ARTICLE III JUDGES ON TERRITORIAL COURTS

SEC. 611. (a) AMENDMENT TO SECTION 291 OF TITLE 28, UNITED STATES CODE.—Section 291 of title 28, United States Code, is amended by adding the following new subsection at the end thereof:

"(c) The chief judge of the United States Court of Appeals for the Ninth Circuit may assign any circuit or district judge of the Ninth Circuit, with the consent of the judge so assigned, to serve temporarily as a judge of any duly constituted court of the Marshall Islands, the Federal States of Micronesia, or Palau whenever an official duly authorized by the laws of the respective compact state requests such assignment and such assignment is necessary for the proper dispatch of the business of the respective court.".

(b) Effective Date.—The amendment made by this section shall take effect on the date of enactment of this Act.

CIRCUIT JUDICIAL CONFERENCE AMENDMENTS

Sec. 612. (a) Amendments to 28 Section 333 of Title 28, United States Code.—Section 333 of title 28, United States Code, is amended as follows:

(1) in the first sentence of the first paragraph by striking out "annually" and inserting in lieu thereof "biennially, and may summon annually,";

(2) in the last sentence of the first paragraph by striking out "the United States district court for the district of the Canal Zone,"; and

(3) in the last sentence of the first paragraph by striking out "annually" and inserting in lieu thereof "biennially, and may be summoned annually,".

(b) Effective Date.—The amendments made by this section shall take effect on the date of enactment of this Act.

INCENTIVE AWARDS

Sec. 613. (a) Amendment to 28 Section 604 of Title 28, United States Code.—Section 604 of title 28, United States Code, is amended by inserting after the term "compensation" the first time it appears in paragraph (5) the following: ", including a program of incentive awards,".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.

JUDICIAL IMMUNITY

SEC. 614. (a) AMENDMENT TO SECTION 722 OF THE REVISED STATUTES (42 U.S.C. 1988).—Section 722 of the Revised Statutes, as amended, is amended by striking the period at the end thereof and inserting at the end the following language: ", *Provided:* That no such fees shall be awarded against a judge or judicial officer who would be immune from actions for damages arising out of the same act or omission about which complaint is made.".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on the date of enactment of this Act.

WAIVER OF CLAIMS FOR OVERPAYMENT OF JUDICIAL PAY AND ALLOWANCES

SEC. 615. (a) AMENDMENTS TO SECTION 5584 OF TITLE 5, UNITED STATES CODE.—Section 5584(g) of title 5, United States Code, is amended—

(1) in paragraph (4) by striking out "and";

(2) by striking out the period at the end of paragraph (5) and inserting in lieu thereof "; and"; and

(3) by adding at the end thereof the following:

"(6) the Administrative Office of the United States Courts, the Federal Judicial Center, and any of the courts set forth in section 610 of title 28.

For purposes of this section, the Director of the Administrative Office of the United States Courts shall be the head of the agency in the case of those entities set forth in paragraph (6) of this section.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to erroneous payments made on or after the date of enactment of this Act.

IMPROVEMENT OF THE APPEALS PROCESS WITH RESPECT TO ARBITRATION

SEC. 616. (a) AMENDMENT TO TITLE 9.—Chapter 1 of title 9, United States Code, is amended by adding at the end thereof the following new section:

"§ 15. Appeals

"(a) An appeal may be taken from—

"(1) an order—

"(A) refusing a stay of any action under section 3 of this title;

"(B) denying an application to compel arbitration under section 4 or 206 of this title;

"(C) confirming or denying confirmation of an award or partial award;

"(D) modifying, correcting, or vacating an award;

"(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; and

"(3) a final decision with respect to an arbitration that is subject to this title.

"(b) Except as otherwise provided in section 1292(b) of title 28, United States Code, an appeal may not be taken from an interlocutory order—

"(1) granting a stay of any action under section 3 of this title;

"(2) compelling arbitration under section 4 or 206 of this title; or

"(3) refusing to enjoin an arbitration that is subject to this title.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 1 of title 9, United States Code, is amended by adding at the end thereof the following new item:

"15. Appeals.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.

SALARIES

SEC. 617. (a) AMENDMENTS TO 28 SECTION 603 OF TITLE 28, UNITED STATES CODE.—Section 603 of title 28, United States Code, is amended—

(1) by designating the existing paragraph as subsection (a) and striking out "level V" in the second sentence and inserting in lieu thereof "level IV";

(2) by adding a new subsection (b) as follows:

"(b) The Director may establish up to six positions to be paid in the same amount as the annual rate of basic pay for positions at level V of the Executive Schedule under section 5316 of title 5.".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.

COURT SECURITY

SEC. 618. (a) AMENDMENTS TO 28 SECTION 603 OF TITLE 28, UNITED STATES CODE.—Section 604(a) of title 28, United States Code, is amended by redesignating the existing paragraph (17) as (18) and by inserting the following new paragraph (17):

"(17) Receive and expend, either directly or by transfer to the United States Marshals Service or other Government agency, funds appropriated for the procurement, installation, and maintenance of security equipment and protective services for the United States Courts in courtrooms and adjacent areas, including building ingress-egress control, inspection of packages, directed security patrols, and other similar activities;".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act.

TRAVEL REIMBURSEMENT

SEC. 619. (a) AMENDMENTS TO SECTION 604(a) OF TITLE 28, UNITED STATES CODE.—Section 604(a)(7) of title 28, United States Code, is amended by inserting a comma in lieu of the semicolon at the end thereof and adding thereafter the words, "without regard to the per diem allowances and amounts for reimbursement of actual and necessary expenses established by the Administrator of General Services under section 5702 of title 5: *Provided,* That the reimbursement of subsistence expenses may not exceed that authorized by the Director for judges of the United States under section 456 of this title;".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act.

REPORTS AND STATISTICS

SEC. 620. (a) AMENDMENT TO THE FINANCIAL INSTITUTIONS REGULATORY AND INTEREST RATE CONTROL ACT OF 1978 (12 U.S.C. 3421).—Section 1121 of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 is amended by adding the following new subsection at the end thereof:

"(b) The report required by subsection (a) of this section shall not be required after the report is submitted in the year 1989.".

(b) AMENDMENT TO SECTION 2412 OF TITLE 28, UNITED STATES CODE.—Section 2412(d)(5) of title 28, United States Code, is amended by striking the words from "The Director" through "this title," and inserting in lieu thereof the following: "The Attorney General shall report annually to the Congress on".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.

DISTRICT OF COLUMBIA PUBLIC DEFENDER AMENDMENTS

SEC. 621. (a) DISTRICT OF COLUMBIA COURT REFORM AND CRIMINAL PROCEDURE ACT AMENDMENT.—The District of Columbia Court Reform and Criminal Procedure Act (84 Stat. 473), is amended by—

(1) striking "by a designee of the Administrative Office of the United States Courts" in section 306(b) (D.C. Code 2–2226(b)) and inserting in lieu thereof "other designee of the Board"; and

(2) amending section 307(a) by—

(A) striking "appropriated for the judiciary to be" in the second sentence;

(B) striking "Administrative Office of the United States Courts" in the second sentence and inserting in lieu thereof, "Board of Trustees of the District of Columbia Public Defender Service"; and

(C) striking "Administrative Office" in the third sentence and inserting in lieu thereof "Board".

(b) EFFECTIVE DATE.—The amendments made by this section shall be effective on October 1, 1988.

CLAIMS COURT FEES

SEC. 622. (a) AMENDMENT TO SECTION 2520 OF TITLE 28, UNITED STATES CODE.—Section 2520 of title 28, United States Code, is amended by striking out "$60" and inserting in lieu thereof "$120".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect thirty days after the date of enactment of this Act.

TEMPORARY EMERGENCY COURT OF APPEALS

SEC. 623. (a)(1) AMENDMENTS TO PHASE OUT THE TEMPORARY EMERGENCY COURT OF APPEALS.—Section 211 of the Economic Stabilization Act of 1970 (Public Law 91–379, as amended; 84 Stat. 799) is amended by deleting all after subsection (a) and inserting in lieu thereof the following:

"(b) Appeals taken on or after October 1, 1988 from orders or judgments entered by a district court of the United States shall be taken in accordance with the provisions of sections 1291 and 1292 of title 28, United States Code. Exclusive jurisdiction over appeals brought under this section shall be in the (United States Courts of Appeals for the respective geographical circuits) (United States Court of Appeals for the Federal Circuit).".

(2) Section 506(c) of the Natural Gas Policy Act of 1978 (Public Law 95–621; 92 Stat. 3350) is amended by striking in the first sentence the language "the Temporary

Emergency Court of Appeals, established pursuant to section 211(b) of the Economic Stabilization Act of 1970, as amended," and inserting in lieu thereof "the (United States Courts of Appeals for the respective geographical circuits) (United States Court of Appeals for the Federal Circuit)"; and by striking the phrase "Temporary Emergency Court of Appeals" wherever it appears and inserting in lieu thereof, "(United States Courts of Appeals for the respective geographical circuits) (United States Court of Appeals for the Federal Circuit)".

(3) Section 1295(a) of title 28, United States Code, is amended by striking the word "and" at the end of paragraph (9) and by adding the following new paragraphs:

"(11) of an appeal under section 211 of the Economic Stabilization Act of 1970 (Public Law 91-379, as amended; 84 Stat. 799);

"(12) of an appeal under section 5 of Public Law 93-159, as amended, (87 Stat. 633 15 U.S.C. 754);

"(13) of an appeal under section 506(c) of the Natural Gas Policy Act of 1978 (Public Law 95-621; 92 Stat. 3350); and

"(14) of an appeal under section 523 of Public Law 94-163, 89 Stat. 962 (42 U.S.C. 6383(b))."

(b) Effective Date.—The Temporary Emergency Court of Appeals shall be abolished effective at the close of business on September 30, 1988. All appeals pending in that court but not yet submitted to a panel on that date shall be assigned to the (appropriate court of appeals) (United States Court of Appeals for the Federal Circuit) as though they had originally been filed in that court. Any case that has been submitted to a panel of the Temporary Emergency Court of Appeals and as to which the mandate has not yet been issued shall remain with that panel for all purposes and, notwithstanding the provisions of sections 291 and 292 of title 28, United States Code, that panel shall be designated to the appropriate court of appeals United States Court of Appeals for the Federal Circuit for the purpose of deciding such case.

JUDICIAL COST-OF-LIVING INCREASES

SEC. 624. Section 140 of Public Law 97-92, 95 Stat. 1183, 1200), is hereby repealed.

○

Senator HEFLIN. We are delighted to hear from you, Judge Hunter.

STATEMENT OF A PANEL CONSISTING OF HON. ELMO B. HUNTER, FORMER CHAIRMAN, COMMITTEE ON COURT ADMINISTRATION, JUDICIAL CONFERENCE OF THE UNITED STATES, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI; HON. RICHARD M. BILBY, CHAIRMAN, COMMITTEE ON JUDICIAL IMPROVEMENTS, JUDICIAL CONFERENCE OF THE UNITED STATES, CHIEF JUDGE, U.S. DISTRICT COURT OF ARIZONA

STATEMENT OF ELMO B. HUNTER

Judge HUNTER. Mr. Chairman, I am Judge Elmo B. Hunter, from the District Court of the Western District of Missouri, now in senior status. With me is Judge Richard Bilby, the chief judge of the U.S. District Court of Arizona, and the present Chairman of the new Committee on Judicial Improvements of the Judicial Conference.

I am winding up about 20 years of committee service and my primary function here, other than to try to be helpful to this committee, is to introduce Judge Bilby. He really needs no introduction. I am sure that he will carry on the long tradition of friendship between this committee and the Judicial Conference of the United States as its representative.

We appear today to present the views of the judiciary on Senate bill 1482, the Judicial Branch Improvements Act of 1987.

This bill represents the position of the judiciary on a variety of issues. It was transmitted to the Congress by the Judicial Conference in May of 1987, and introduced by the chairman of this subcommittee in July as S. 1482.

The first thing I want to do, sir, is to tell you how grateful the judges of the Nation are for your willingness to introduce this bill and to give us this opportunity to communicate to you and to your committee the views of the judiciary on these important subjects.

The bill is a broad one. We think it is largely, if not entirely, noncontroversial. It touches many aspects of the judicial system that are really not in dispute, but which need some fine-tuning, and which have long needed that fine-tuning. It does not contain some of the more controversial or costly requests that have come from the judicial branch, such as our request for additional judgeships, the new retirement program for our nonarticle III judges, or the elimination of the diversity of citizenship jurisdiction.

We call it our housekeeping bill. We do not like to think of it as purely technical because it does have a number of things in it which, if passed, will certainly improve the judiciary in its ability to administer itself.

We have previously filed with this subcommittee a detailed statement setting forth the Judicial Conference's justification for S. 1482. I might say it is 34 pages, Mr. Chairman, and we are going to leave the details to that statement. I am simply going to mention a high spot or two and Judge Bilby then will be carrying the ball on a number of other matters.

We have included in our statement explanations of several additional provisions that have been adopted by the Judicial Conference of the United States since the original bill was transmitted to you. And, again, those matters are set out in our 34-page statement, which is a part of this record.

First, we revisit the subject in title I of Mandatory Jurisdiction. There is little that we need to say now except to express to you on behalf of each and every one of the Justices of the U.S. Supreme Court their appreciation for you having adopted S. 952 last December. And we all hope that this time the Supreme Court will get its long-needed relief from mandatory jurisdiction and have it all based on the certiorari process.

Title II of our bill makes several technical amendments to the Jury Selection and Service Act of 1968. I want to emphasize that there is nothing that changes any of the underlying policies embodied by the act; namely, to be sure that juries are selected at random and from a fair cross-section of the community.

The bill, as amended, will simply permit the Judicial Conference, under very close scrutiny, to experiment in a limited area, that is to experiment with the mechanics of the jury selection process and utilize modern technology to achieve a more efficient system of jury selection, and, incidentally, to save some money in the process, not large.

The amendments will result in one good thing in that they would include a broader segment of the community in being eligible for jury service. The only ones that will be ineligible, as a matter of law, are the persons who are on active duty in the Armed Services of the United States.

Title III of the bill provides authorization to establish a form of alternative dispute resolution, known as court-annexed arbitration. I anticipate there will be some questions in that area, so I will not try and get into it any more than to mention it very briefly here.

The thrust of the changes that we seek actually bring us into position with the Kastenmeier bill, with which I am sure this committee is well aware. We want to carry forward arbitration procedures in the 10 courts that now have it, and we want to have authority to add 13 additional ones.

We want some small room for experimentation, not a great deal, because we have already learned a good deal. We have had two courts, for example, that have had arbitration now for 10 years and a number of courts that are reaching the 3-year mark. Our experience is beginning to give us the answers. But, in any event, we know that we have 5 more years under this bill to have a total of 23 courts using this arbitration and then we will report our experience fully. The bill contains a sunset provision so that at that time it can be thoroughly examined as to whether it is worth the salt.

I can tell you one surprising thing that we have learned, and that is the overwhelming support for this type of arbitration by the judges and by the bar. Over 95 percent of the judges think it is great. And with the bar it is well over 85 percent who have taken it to their bosom. It has turned out to be very popular. That 85 percent is a growing number because as the various sections of the country learn how it actually operates in practice, any initial opposition may dissolve.

So we have a happy report in that situation.

Title IV of the bill provides authorization for a District Court Executive Program. It is limited to courts that have eight or more judges and the court does not have to adopt it. Indeed, it cannot adopt it unless its Judicial Council approves the need of it. So we are on safe ground there.

Those that do have a district court, I think there are six districts now throughout the country that have it, give a good report on it. But we do not have any stampede to add district executives. It takes a fairly large court to justify a court executive.

Title V of the bill contains four separate provisions that affect the Federal Judicial Center. Again, I am sure this subcommittee is familiar with them. Judge Godbold has approved them all. He is, of course, the Director of the Center, and he seeks the enactment of each of the four provisions contained in title V.

Title VI of the bill contains a series of miscellaneous provisions on various subjects and I am not going to try and comment on all of them at this point. They are all covered in detail in our 34-page statement. I do want to highlight section 608 of title VI.

Section 608 would permit a Federal court to dismiss frivolous habeas corpus review of State court convictions, even though the State remedies have not been exhausted. I mention that in particular because I want to state on the record that the State court judges strongly approve of this change as well as the Judicial Conference of the United States.

If you dismiss a frivolous action, you are not short-cutting the Federal-State process at all. You are just simply stopping a costly and useless procedure. It will not impair the Federal-State relationship.

That pretty well covers the part that I wanted to mention in this opening statement. I hope you will take Judge Bilby to heart as you have me in the past years. I know he will be invaluable to you. Both Judge Bilby and I are ready to stand a little cross-examination.

Senator HEFLIN. Judge Bilby.

STATEMENT OF RICHARD M. BILBY

Judge BILBY. I am at your service, sir.

Senator HEFLIN. There are several provisions within this bill which I have characterized as internal matters affecting the Judicial Conference or the Administrative Office. While there may be no objections to these provisions on an individual basis, I would like to know if the Conference has an estimate of the cost of some of these provisions, knowing that the judicial branch took a substantial cut in appropriations last year, as did a lot of agencies. Are there funds available to implement some of these changes?

Judge BILBY. Yes, sir, we have a cost impact of the provisions included in the bill, and we would like to make it a part of the record if we may.

Senator HEFLIN. What is the overall figure?

Judge BILBY. I do not have the overall figure because the problem is that some things are saving and some things are cost, and it just depends if you adopt all or any of them. Of course, we all know that elimination of diversity jurisdiction would save the most money, but that is probably out of the question. I will say that with respect to three of the items which we consider very important; that is the salary considerations for the Deputy Director of the Federal Judicial Center; the increase in pay for the circuit executives and the three executive level positions for the Administrative Office, the cost is relatively minor, but the benefit is substantial. We certainly hope that those can be approved.

Senator **Heflin**. What are the possible concerns raised by members of the legal community to the changes suggested in the amendments to the Jury Selection and Service Act of 1968?

Judge **Bilby**. We have had none that we know of. I can tell you the experience in Arizona. We recently went to a jury service plan where we did away with all exemptions except the statutory exemption. We did away with exemptions for lawyers, doctors, judges, people of that nature. And, as a result, people come in and serve—they are called one time. If they serve on a jury, they are through. If they do not get selected, they are subject to being called a second time and then, whether they are selected or not, they are through. As a result, we see a much broader cross-section of people and the lawyers seem to be very excited about it. I would think what we are doing in this bill would, to some extent, even broaden that because the only people who would be statutorily exempted from jury service would be members of the Armed Forces. The bill would also allow us the flexibility to use modern technology in drawing our pools.

Senator **Heflin**. Section 604 of Senate bill 1482 would exempt bankruptcy judges, magistrates and their law clerks from the Federal Leave Act. What, specifically, is the problem under the Leave Act?

Judge **Bilby**. First, let me refer you to our written statement for a full explanation. Briefly, however, our law clerks serve varying periods of time, from 1 to 2 years. Their schedule and working hours are essentially at the pleasure of the judge and tend to match his or her schedule. In a sense, law clerks are comparable to congressional staff who are not masters of their own schedules and, therefore, are not under the Leave Act. In addition, it is just an expensive bookkeeping process.

On the other hand, both the bankruptcy judges and the magistrates are judicial officers. They should be treated just like the article III judges with respect to leave. Incidentally, we estimate that this proposal will save several million dollars annually.

Senator **Heflin**. Section 607 of this bill would extend the Certificate of Probable Cause requirement to appeals from the district court decisions or habeas corpus petitions of Federal prisoners. S. 1482 would allow the certificate to be issued by the judge who rendered the original order or a circuit judge. The Department of Justice in its testimony suggests that probable-cause determination be required to be made exclusively by an appellate judge. Would you comment on their suggestion?

Judge **Bilby**. Well, it has been done for the past how many years by the district judge. I think most district judges bend over backwards to find it for two reasons: one, just the general feeling that everybody ought to have their day in court, and, second, if they do not do it, the appellate court will do it anyway.

Senator **Heflin**. Section 610 of S. 1482 deals with a situation where a judge has devoted a significant amount of time to a case and later discovers that he or she or a family member has a financial interest in the case. Under current law, section 455 of title 28 requires a judge to disqualify himself or herself in any case in which he or she or members of his or her family are parties to the case or have a financial interest in a party to the case. Disqualification under this statute is automatic. S. 1482 would allow greater discretion to the judge by allowing the parties to agree to a waiver of disqualification or allow the judge to use his or her discretion if the financial interest is not significant.

The Justice Department raises some concern with these provisions and suggests requiring the judge, if he wishes, to remain on the case, to divest himself of the financial interest. Is this a better approach?

Judge **Bilby**. Well, I can answer personally. I cannot answer for the Judicial Conference because that aspect of it never came before the Judicial Conference. Personally speaking, that does not bother me at all. It seems to me if a judge wants to stay in the case, he or she ought to be willing to divest. Something does need to be done because there have been cases cited in the written material to you about Judge Muecke in Arizona who worked on a case for 6 years involving thousands of parties and then discovered his wife owned some minuscule amount of stock in one of the parties. Judge Muecke had to get out of the case and some other judge had to come in and reeducate him or herself about the case. We are all faced with that and I think the lawyers as well as the judges just want this committee to give us some clear guidance to a quick sure way to do this so that we do not waste their time and all of the judicial effort.

Senator **Heflin**. Section 616 of S. 1482 amends the U.S. Arbitration Act to add a provision dealing with appeal from judicial orders relating to arbitration. Do these provisions in a sense favor arbitration over judicial mechanisms. Would you comment on the nature of these provisions?

Judge **Bilby**. Senator, you are correct. The first part of the proposal permits an appeal where the effect of the court order favors litigation over arbitration. On the other hand, the second part would not permit an appeal in stated instances in which an interlocutory judicial order favored arbitration over litigation. You may note in our written statement, this modest preference for arbitration has the potential for great savings in judicial time and litigation expenses without risking much cost.

Senator **Heflin**. There is a provision in S. 1482 dealing with court security. I am not certain what the problem is in conjunction with court security. Is the judicial branch or the Marshals Service responsible for court security?

Judge **Bilby**. Yes, sir. We are responsible financially. They are responsible from the technical aspect. They are in charge of security. They contract out, get the court security officers and make sure they are properly trained, but we then reimburse them for that expense.

Senator **Heflin**. There is a provision in the House bill that would decrease the filing fees in U.S. district courts from $120 to

$90. How are fees used to offset the cost of operating our courts and what would be the effect of such a decrease?

Judge BILBY. The fees have just been put into the general treasury. In the last continuing resolution we were allowed to use a portion of these civil filing fees to offset some of the decrease in appropriated money. We would be against decreasing the filing fees from $120 to $90. But that is more of a revenue matter than anything.

Senator HEFLIN. There is a proposal to abolish the Temporary Emergency Court of Appeals which currently has 24 judges and hears cases involving rate setting in the oil and gas industry. One proposal is to have these cases dispersed to the geographical Courts of Appeal and to the Federal Circuit. One proposal would transfer all pending cases and future jurisdiction to the Federal Circuit. Have the industries which are involved in these cases commented on the possible abolition of this court? What are the benefits of transferring all jurisdiction to the Federal Circuit?

Judge BILBY. I assume the industries involved have had an opportunity to comment. I am not aware of any problem. As to the appropriate reviewing court, I would think that the Federal Circuit is the place it should be for two reasons: No. 1, these are similar cases from all over the country. There is no use having the varying circuits end up with different results. And, second, the other circuits are very, very busy and the Federal Circuit seems to be about the least busy of the circuits. They certainly can afford the time and effort to do the job more expeditiously. We would hope that is where they would end up.

Senator HEFLIN. There is discussion in your testimony concerning ways to cut back on diversity of citizenship jurisdiction. One such proposal is to increase the amount in controversy from $10,000 to $50,000. Is this a real change or just cosmetic?

Judge HUNTER. Senator, the opponents of diversity jurisdiction are well known and the arguments pro and con are well known. Increasing the amount from $10,000 to $50,000 does have an aspect of being cosmetic. It simply catches the jurisdictional amount up with inflation since the $10,000 sum was allowed. We expect some, but very little, cutback from raising that amount. On the other hand, we favor it because at least it is a step, a very small step, in the right direction.

Senator HEFLIN. Would you comment further on the change in the definition of corporate citizenship?

Judge HUNTER. What we are trying to do there is, frankly, to clarify a corporate venue question. Under the proposal, if you have a corporation in a State that has more than one judicial district, for example, the corporation shall be deemed to reside in any district within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State. And if there is no such district, then the corporation is deemed to reside in the district in which it has the most contacts.

We find that this will be a clarification because, frankly, the law is in somewhat of a mess on this general subject. It is fair and the Judicial Conference is strong in its recommendation for this change.

Senator HEFLIN. There is discussion in your testimony and the testimony of the Department of Justice concerning multiparty, multiforum jurisdiction. As I understand this concept, it would create new Federal jurisdiction in civil actions arising out of the same transaction, occurrence, or series of related transactions or occurrences if any party is a citizen of a different State, then any adverse party (minimal diversity), and if two or more defendants reside in different States or substantial acts occur in different States. It appears that both the Judicial Conference and the Department of Justice would limit this jurisdiction somewhat.

Judge BILBY. Well, Senator, we are actually suggesting a new jurisdiction. What we are trying to get at are cases such as the recent Northwest airplane crash in Detroit, where you have people from various States. It just so happens in this instance the plane was bound for my State, and several of my friends were on the plane who were lawyers. Fortunately, for others, including our U.S. attorney, they decided to not take that plane. This provision is aimed at trying to make some sense out of a major problem with various States competing for which State is going to have jurisdiction. If it is in the Federal Court, we certainly have multidistrict litigation which is taking over, but then cases are filed in the State courts and we have the grave possibility of conflicting decisions on liability. This is just an attempt to make some sense out of a really nasty situation. And we think it will not deprive anybody of their right or their day in court, but it will make one decision on liability.

Senator HEFLIN. How would a judge determine which substantive law to apply?

Judge BILBY. The Judicial Conference has not taken a position on the choice of laws issue. That is for Congress. Personally speaking, I think the bill talks about where the event occurred as one factor to consider. So I assume if it were going to be a crash in Des Moines, IA, that the Iowa law would probably apply. But it just seems to me that that is the better way to do it. To some extent you are taking your chance, but at least that is where the event occurred. If you do not do something like that, Senator, you are going to have this kind of a question: A plane takes off in Trenton, NJ, loaded with a group of lawyers from New York City on their way to the Bar Association in Toronto, Canada, and it turns out the plane which was leased from a company based in Philadelphia, had maintenance performed in Cleveland, OH, and the person doing the maintenance left a bolt out of the right strut on the wing and, as the plane was flying from Trenton, it was proceeding over Vermont on its way to Canada and the wing fell off and they crashed in New Hampshire. You know, if there is not some rule set by Congress under those circumstances, we are going to be dancing the conflicts of law question. It becomes a very difficult thing. It seems to me that this bill would assist us if it would make the applicable law that of the place of the crash or the event that caused the injury.

Senator HEFLIN. Well, the event that caused the injury and the crash could have occurred in different States.

Judge BILBY. Yes, I understand that the proposal deals with it, as I understand it, by making the law of the place where the actual injury took place be the law that would govern. And if you do not do it in some sort of specific way like that, then we are going to be back in our whole conflicts of law question again and it becomes a very complex thing. If we can clarify these issues before the event, it is a lot easier. While it may create some slight unfairness in some cases, in the overall it probably will not. As you and I both know, once the event has occurred, then everybody, including lawyers, have vested interests and it becomes very difficult to arrive at a decision. Frequently, the choice of law becomes the most hotly contested issue in the case.

Senator **Heflin**. Well, I was just thinking of a lot of different scenarios that could occur.

Judge **Bilby**. Oh, yes, sir, and have.

Senator **Heflin**. Yes.

Would the Federal Court simply have jurisdiction over the liability issue, with damages established in another court?

Judge **Bilby**. Yes, sir. The liability issue would be decided in the one court and then the cases, as I understand it, would go back to the courts in which they were filed for a determination of damages unless there was a good reason to keep them together. And there is a reason for that, I assume. The policy reason behind that is that you are then going to go back to the State where the people lived and that State does have a unique interest in seeing that its citizens have rights to certain damages. Now that is going to lead—I must admit to you right off the bat, that is going to lead to some differing results in the sense that States such as Washington do not have punitive damages. States such as Arizona do. California has it under very limited circumstances. The amount of damages may well vary. But it seems to me the damage question is a little bit different from the liability question.

Senator **Heflin**. Well, does that add additional trials? I mean do you have a liability jury and you go back to another State, transfer it, you have a damage jury?

Judge **Bilby**. You might well with respect to those cases that were in the State system. As to the Federal system, it seems to me, there is a multidistrict panel and the whole thing could be handled at one time. As to the State cases, yes, there would be some more trials on damages in the various States. But, without this bill, there would be a trial on liability as well as damages in the States and you could very well run into some problems there. It seems to me that what you are being asked to decide from a policy standpoint if it is more important that we get one decision on liability so that everybody either collects or does not collect. After that is resolved, allow the various States to exercise their decisions as to what the amount of damages should be. It is probably more important from a policy standpoint that the liability question needs to be decided the same way than it is the damages question.

Senator **Heflin**. After they go into bankruptcy, there might be a different approach.

Judge **Bilby**. Anything can happen.

Senator **Heflin**. With a single forum situation by which they all can go. All right, now, on the arbitration. You indicate in your testimony that the Conference also supports an arbitration provision proposed by Representative Kastenmeier which would statutorily authorize experimental arbitration programs in 13 districts and 10 additional districts to be approved by the Judicial Conference.

Would you comment on the current pilot court-annexed arbitration programs being conducted?

Judge HUNTER. I come from a district, Mr. Chairman, that has arbitration. We have had an ongoing arbitration program now for a little over 3 years. So I am familiar with how it operates in practice. We are not having any difficulty with our program at all. It has turned out to be very popular with the bar and the judges have come to like it because we have reached that point on our docket where we know that unless we get some kind of outside help that will resolve conflicts, our courts may not be able to handle the volume. What really happens is the civil cases are punished when a court's docket gets too crowded. Arbitration has worked well for us and it has enabled us to keep our civil docket current by giving us that additional time. And we simply have not had any problem. We are one of those that report a completely favorable experience. As I said earlier, 95 percent of the judges do that.

Senator GRASSLEY. What about the parties?

Judge HUNTER. The parties likewise. The parties, not as high a percentage, I think a fair statement on that would be to the degree of about 80 percent speak favorably about arbitration being as good as or better than a trial. However, as the parties learn more about it, their statistics come up more to where the judges' statistics are. There are not many that really oppose it.

Senator GRASSLEY. I did not hear you, but I think, basically, you are saying 80 percent.

Judge HUNTER. Yes, sir.

Judge BILBY. Eighty percent with that increasing some as they become more familiar.

Senator HEFLIN. Now, under this House bill, would the arbitration program be mandatory?

Judge HUNTER. No, it would not. The word we have been using is "may".

Senator HEFLIN. I am thinking about the Kastenmeier bill.

Judge HUNTER. Yes, sir. This is the one.

We now have one State, North Carolina, in the experimental program. They have 150,000 as theirs. So I suppose what we are really saying is, let's grandfather it. Let them keep their 150,000. All the rest of us who have 100,000 or less would set the mark at 100,000. That is one of the restrictions.

Let me see if I can run through them very quickly.

Senator HEFLIN. What about the mandatory? Would it compel the arbitrations under that bill?

Judge HUNTER. With respect to compelling parties to go to arbitration in appropriate cases, the Kastenmeier bill does use the mandatory language, but is permissive with respect to whether a particular court should have an arbitration program at all. If a court adopts the arbitration program, then it is mandatory as to those that meet what I call the profile. In other words, if they have the case that meets the guidelines, then the court can compel arbitration.

Senator HEFLIN. Well, are there constitutional problems connected with that mandatory arbitration.

Judge HUNTER. Mr. Chairman, we do not see them. We do not believe that it drives us to that degree.

Senator **Heflin**. What about access to justice, the right of trial by jury?

Judge **Hunter**. The access to justice is still there and the impediment is not very much. Parties can appeal if they do not like the result of the arbitration, and they can get their trial de novo with the jury. It does not, in our minds, raise a constitutional question.

Senator **Heflin**. Is it not also an issue, too, of where your bankruptcy court arising out of State law, *Northern Pipe Line Construction Co.* v. *Marathon Pipe Line Company*——

Judge **Hunter**. Yes, sir.

Senator **Heflin**. What is the issue relative to that where you, in effect, force somebody to go to not just an article I judge, but, necessarily, back to a judicial officer?

Judge **Bilby**. Well, I think the difference, Senator, we are forcing them to engage in arbitration, but that it is not binding final arbitration. They have a right to come back and appeal and go to a full and complete trial before an article III judge which addresses the concerns raised by the *Marathon* case. The worst that can happen to them is, if they do not do as well, they may be assessed some costs. But we have rules already that you can go in and make an offer to confess judgment and, if they do not accept it and they get less than that, they have to pay costs from the date of offer of confession of judgment. So I just do not think there are any real constitutional problems.

Senator **Heflin**. You do not see a similarity between bankruptcy, which was an article I judge in a situation where you have a right of appeal from a bankruptcy court?

Judge **Bilby**. You had a right of appeal, but they entered some final judgment orders. The arbitrator does not enter a final judgment order. It is entered by the article III court after the time for demand for trial de novo has expired.

Senator **Heflin**. Well.

Judge **Bilby**. I see what you are trying to get at, but I think there is a distinction, sir. Arbitration and bankruptcy are procedurally very similar, but are substantively quite different. Both, however, do retain the protections of article III or the "essential attributes" of article III as required by *Marathon.*

Senator **Grassley**. Mr. Chairman, could I ask him, on this point?

Senator **Heflin**. Sure.

Senator **Grassley**. Do you support—there is quite a bit of difference between the Senate approach and Representative Kastenmeier's approach; do you support one or the other or both of them?

Judge **Bilby** The Judicial Conference has instructed us to tell you that they have adopted the Kastenmeier approach with some modest amendments.

Senator **Grassley**. Thank you.

Judge **Hunter**. Senator, let me say one other thing about the judge and jury trial situation. I have just been handed a note to remind me. Our figures now show that 59 percent of all the parties who went through arbitration preferred it over a judge or jury trial. A surprising statistic, but so.

Senator **Heflin**. They prefer it?

Judge **Hunter**. They preferred it over the judge or jury trial, 59 percent. And I certainly agree with Judge Bilby, no final judgment is entered if the party wants to take appeal and get on article III judge or a jury trial.

Senator HEFLIN. Do you have any statistics on those that were successful in their arbitration as opposed to those that were unsuccessful?

Judge HUNTER. Yes, sir, we do.

Senator HEFLIN. As to what those figures are?

Judge HUNTER. May we file those with you? But we do.

Senator HEFLIN. Yes. I would like to see it.

Judge HUNTER. It will show a decrease to some extent, but still a solid majority that make the preference for arbitration.

Senator HEFLIN. Senator Grassley, do you have some questions? I have been asking a lot.

Senator GRASSLEY. Yes. Preliminary to my asking questions, let me say, as a non-lawyer member of this committee, maybe I understand better than most that society ought to depend upon other methods to resolve disputes other than just court trials. I am interested in alternative dispute resolution techniques, particularly as I see, from my work on this committee, the tremendous backlogs the courts have, and also as a way of improving the administration of justice. I do not propose alternative dispute resolution as a cure-all for this mushrooming caseload, and I do not think that we as a committee can turn our backs on any alternatives if those alternatives have a proven track record of success, particularly in the States. I think we also have to look, to some extent, at the private sector. So along that line, and I have already asked some of the questions I was going to ask as I interrupted the chairman here, and thank you, Mr. Chairman for tolerating that. Do you see, Judge Hunter, given your expertise in this area, do you see any justification for the House bill's—the Kastenmeier bill, I guess I should say, restriction on when arbitration may be considered as an alternative to traditional litigation?

Do you see any justification because they restrict the use of it?

Judge HUNTER. Arbitration has its limits. For example, you might call it a restriction, but we do not refer constitutional questions to arbitration. Arbitration works best where you have fact issues. That is where it really pays its way. And when you get into the kind of a case that has a lot of complex legal issues, or some difficult constitutional questions, we do not even try to put those into arbitration.

Senator GRASSLEY. Can I interrupt you then and give you some examples?

What about precluding types of cases like civil rights cases, labor cases, cases seeking equitable relief from being eligible for arbitration, even where the parties agree that arbitration ought to be used and where the results are not binding? Why eliminate those areas?

Judge HUNTER. I do not eliminate civil rights cases where I come from if the bottom line of the dispute is basically over money. We arbitrate those in our group. We do not arbitrate those that call for equitable relief because the arbitration panel does not have that kind of authority and, even by consent, it would be difficult to handle.

Senator **Grassley**. Well, you know the House bill does not spell out that they cannot be used in that wide range of cases, but it looks to me like that is where the House bill leads us to.

Judge **Bilby**. I think you will find, Senator, that most judges agree with Judge Hunter that if it is a civil rights case that can be handled by money damages, and that is a good case to go to arbitration. However, it the claim is for remedial action, then that is best handled by a judge, though sometimes you can appoint masters to help in making some of the determinations. But those get to be legal issues and also equitable issues of how to handle particular problems. And those are probably best left with the judge.

Senator **Grassley**. Let me go on to another point.

Judge **Bilby**. Surely.

Senator **Grassley**. S. 1482 does not provide for the availability of other alternative dispute resolution techniques, such as mediation. I think mediation has proven as a big success for those States that have tried it. And I would like to give you, as an example, the District of Columbia. The D.C. Superior Court resolved a remarkable 345 civil cases by mediation in one 6-day period, and this was just last May. Court officials reported the average length of mediation conferences was 1 hour and 45 minutes, with 23 percent of the cases resolved in 45 minutes or less. They also reported the settlement of a $10 million personal injury case in just a 50-minute conference.

Why shouldn't we and the Judicial Conference encourage Federal courts to establish a full menu of alternative dispute resolution techniques particularly to resolve complex cases that take so long to try?

Judge **Bilby**. I couldn't agree with you more that we ought to try everything we can.

Senator **Grassley**. You do agree with me?

Judge **Bilby**. Oh, yes. And I use active settlement conferences. I have used masters on occasion. I have even used summary jury trials. And they all, in the proper place and the proper time, were effective.

Senator **Grassley**. So if we allowed that in S. 1482 by expanding it——

Judge **Bilby**. That is wonderful. That is just another arrow in our quiver.

Senator **Grassley**. How carefully has the Judicial Conference managed the effects? I should not have gone on. Did you have something, Judge Hunter, that you wanted to say?

Judge **Hunter**. I was going to say that any judge in these modern days who does not know how to use mediation is really in a problem bind. We get about 90 percent settlements where I come from. And if the judge is not in the position of having to be the factfinder, he is a good mediator. But if you want an outside person to cover those cases where the judge cannot ethically cover them, I agree with Judge Bilby, it certainly would be welcome.

Senator **Grassley**. Let me get to some statistical reporting. How carefully has the Judicial Conference monitored the effects of arbitration in the district courts? For example, can you make any judgments on the number of cases resolved by arbitration, or can you compare the length of time taken for resolution by arbitration compared to the results by the court?

Judge HUNTER. Senator, yes, the monitoring has been that careful. Yes, those results are known and, yes, they can be provided you, if you wish them. Yes, they have been a success.

Senator GRASSLEY. The arbitration provisions of the Senate bill provides that the Judicial Conference may develop model rules for use by courts using arbitrations. How might these new rules affect those districts that are already part of the pilot arbitration program? Would they have to change their rules and procedures already in place, or could these districts be grandfathered in into the national program?

Judge BILBY. I guess the answer to that is yes, no, yes.

Senator GRASSLEY. OK.

Judge BILBY. They will make some changes and, no, there is no reason why they could not grandfather them in. And yes, I think they probably would be willing to consider that.

Senator GRASSLEY. Buried in the back of the bill, the Administrative Office quietly proposes to shift its responsibility for monitoring the Equal Access to Justice Act in compiling statistical data to the Department of Justice. And it is buried there because there is no title on this section unlike other sections.

Judge BILBY. I will——

Senator GRASSLEY. Just a minute.

Judge BILBY. OK, excuse me.

Senator GRASSLEY. I along with Senator DeConcini are sponsors of the reauthorization of the Equal Access to Justice Act. So I am very interested in that law and in continuing good oversight data availability. What is the justification for the change, especially given the fact that the Administrative Office rather than the Department of Justice has access to the information on the number of awards made under the law? And when did you last issue a report to Congress on awards under the Equal Access to Justice Act?

Judge BILBY. Answering your last queston first, the last report was included in the 1987 Annual Report of the Director of the Administrative Office, and it covers the 12-month period from July 1, 1986, through June 30, 1987.

Senator GRASSLEY. OK.

Judge BILBY. It is an annual report and we gave copies to staff.

Senator GRASSLEY. What is the justification then for the change?

Judge BILBY. The justification is that the Justice Department defends all of the claims or substantially all of them I am aware of. They know better than we do because they are actively involved when the decisions are made. So they are the best source of information. Our clerk's offices must search the records for these claims before reporting to the Administrative Office, while the information is already available to U.S. attorneys. It seems to me our proposal is going to save us some money.

Senator GRASSLEY. Thank you. Thank you, Mr. Chairman.

Senator HEFLIN. Thank you. Thank you, gentlemen. We might have questions submitted in writing. If we do, we would appreciate your response.

Judge BILBY. We will be happy to answer them.

Thank you for the time, sir. I look forward to working with both of you.

[The statements of Hon. Elmo B. Hunter and Hon. Richard M. Bilby, along with responses to written questions, follow:]

PREPARED STATEMENT

OF

JUDGE ELMO B. HUNTER

AND

JUDGE RICHARD M. BILBY

ON BEHALF OF

THE JUDICIAL CONFERENCE OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

THE JUDICIAL BRANCH IMPROVEMENTS ACT OF 1987

FRIDAY
MARCH 18, 1988

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A. INTRODUCTION.

Mr. Chairman and members of the Subcommittee, I am Judge Elmo B. Hunter speaking on behalf of the Judicial Conference of the United States. I am accompanied today by Judge Richard M. Bilby, Chief Judge of the United States District Court of Arizona and Chairman of the Judicial Conference Committee on Judicial Improvements. In a sense, my presence here today is to introduce Judge Bilby to the Subcommittee, lend him my institutional memory as long-time chairman of the Conference's now dissolved Committee on Court Administration, and wish him well as a future spokesman to the Congress on legislative improvements to the Federal Judiciary. I know that Judge Bilby will continue the tradition of close cooperation with this Subcommittee.

It is a privilege to appear before you today to present the views of the Judicial Conference on various aspects of S. 1482 — the "Judicial Branch Improvements Act of 1987." This bill was transmitted to the Congress by the Director of the Administrative Office of the United States Courts on behalf of the Judicial Conference in May 1987. I appreciate the Chairman's willingness to introduce this bill on behalf of the Conference. The Subcommittee and its staff have been most helpful to the Judiciary, working in a spirit of cooperative effort, seeking answers to the difficult problems that confront the Federal courts today. Indeed, earlier this Congress Senator Heflin wrote to Director Mecham, setting forth a tentative agenda and soliciting the views of the Judiciary as to what other areas might be fruitfully explored. A copy of that letter is attached to my testimony as Appendix A. Today's testimony and the various transmittals we have made to this Congress are a part of what we hope will be a comprehensive response to the Chairman's call.

The bill which occasions these hearings is a broad one. It touches many areas of the judicial system. It will, we think, provide a firm foundation for the resolution of a number of problems which have lingered too long.

Early this year the Director of the Administrative Office of the United States Courts undertook to compile all of the outstanding legislative recommendations of the Judicial Conference of the United States for transmittal to the Congress. On the one hand, some of these proposals involved discrete subjects that, for one reason or another, it was thought should be transmitted as separate messages to Congress, such as bankruptcy judge and magistrate retirement, new Federal judgeships, and total abolition of diversity jurisdiction. On the other hand, a significant number of major and minor unrelated recommendations appeared to be of the type that could logically be submitted to and considered by the Congress in a multiple-part omnibus judicial improvements measure.

My analysis here has been broken down into two parts. The first consists of those subjects in S. 1482. The second part concerns some positions taken by the Judicial Conference since S. 1482 was introduced which we feel should be considered for inclusion in an omnibus bill.

B. ISSUES IN S. 1482

I. Mandatory Jurisdiction of the Supreme Court (Title I)

This title of S. 1482 would substantially eliminate the mandatory or obligatory jurisdiction of the Supreme Court. It is almost identical to S. 952, reported by the Senate Committee on the Judiciary on March 15, which is supported by the Judicial Conference as amended. This hearing provides another opportunity for the Conference to reaffirm its commitment to enactment of these important reforms of the Supreme Court's jurisdiction. (Conf. Rept., March 1987, p. 13). Under current law, certain cases may be appealed directly to the Supreme Court and the Court is obligated to review and decide these cases. In most instances, these cases do not involve important issues of Federal constitutional law. The net effect of this title is to convert the method of Supreme Court review to the discretionary, certiorari approach that applies generally to court review of decisions of the United States courts of appeals and the highest courts of the States.

This change in appellate review was supported by all nine Justices of the Supreme Court in 1982 because, as they have stated, "it is impossible for the Court to give plenary consideration to all the mandatory appeals it receives". Moreover, even though the summary dispositions of the Court in mandatory jurisdiction cases are binding on the lower Federal courts and state courts, such decisions, according to the Court, "sometimes create more confusion than they seek to resolve". Chief Justice William Rehnquist reaffirmed the support of the Supreme Court during the consideration of S. 952 by letter to Senator Heflin. That letter is attached as Appendix B.

Until 1891 the docket of the Supreme Court was largely obligatory. If a party chose to appeal to that court, and the court had jurisdiction over the case, it was obliged to hear and to decide the case.

In that year, Congress passed the Evarts Act. In addition to creating the Circuit Courts of Appeals, that Act gave the Supreme Court discretion to hear certain cases or not. Despite this significant alteration, the caseload of the Supreme Court continued to grow.

In 1925 Congress responded again. In the Judges Act, the discretionary, certiorari jurisdiction was again expanded. This time the discretionary jurisdiction became the norm. However, the category of mandatory jurisdiction, despite some piecemeal changes in the interim, remained broad.

The remaining cases largely concern Federal court findings that state statutes are unconstitutional and State court findings that state statutes are constitutional. These categories are the friction points of Federalism, and no one can deny their theoretical importance. However, the reality is that most of these cases are mundane. Only a handful represent major issues of national significance. Even some of these are not truly ripe for the ultimate dispositive step of Supreme Court resolution. The issues would be better resolved after analysis by several courts.

Nonetheless, as things stand, each of these cases must be decided by the Supreme Court as it arises. The underlying assumption is that the jurisdiction must be mandatory because otherwise the Court might not review the significant cases that sometimes arise under this jurisdiction.

That premise stands in direct contradiction to the management of the rest of the Court's docket. There, it is expected that, when an important case arises among those cases in which a Federal court finds a State statute to be constitutional or a State court finds a State statute to be unconstitutional, the Court will be wise enough to separate the wheat from the chaff. Yet it takes little thought to recognize that important cases, cases that really should be the subject of a Supreme Court analysis, are just as likely to arise in the discretionary docket as in the obligatory one.

All of this would be merely of theoretical interest if it were not for the fact that the negative side-effects of the obligatory docket are significant. They lead to time wasted on relatively unimportant cases and to obscuring the very areas of law the obligatory docket was meant to clarify.

First, the Supreme Court is a limited resource. There is only one such court, and it has only nine members. Yet 35-48% of its cases formally disposed of in recent years have been from the obligatory docket. Of the 100 or so annual obligatory cases, only 25-33% have been regarded by the Court as important enough to warrant oral argument or a written opinion. Yet to reach the conclusion in each such case, each member of the Court must read the briefs, analyze the case, and exchange at least internal memoranda. This work, multiplied by more than 100 obligatory docket cases, detracts from the work on other cases of much greater decisional impact.

Second, as noted, the great majority of these cases are decided without opinion. Though unexplicated, these decisions remain decisions of the Supreme Court, binding on all other courts in the nation. The precedential impact of these decisions is unclear in general and as applied in individual cases.

While the Court in recent years has sought to give some guidance on the precedential value of these cases, it has not succeeded in doing so to any significant degree. The current situation can best be described as follows: the summary affirmance of such a case (the normal resolution) is a precedent as to the points necessarily rejected. Deciding what points are necessarily rejected is a matter left to other courts and sometimes requires a minute examination of the record.

In short, the Supreme Court is currently obligated to decide a large number of cases, not readily distinguishable from other cases which it has discretion to decide. Deciding these cases takes a significant amount of time and leads to case resolutions which obscure rather than clarify the law.

The dilemma is universally recognized. All justices of the Supreme Court have in recent years formally supported the abolition of the obligatory jurisdiction. Indeed, in a decade of Congressional consideration of the concept, little substantive opposition has been unearthed.

Yet the bill has floundered each time it has been offered. Sometimes it failed simply for lack of time. Sometimes it became a vehicle for more divisive measures. It is our view that the time is ripe to complete this long-needed reform, and we urge speedy action by the Congress.

I should note that there are some minor technical matters that must ultimately be resolved. The three bills pending before Congress — S. 952, as reported, S. 1482, and H.R. 3152 — vary in slight degrees. A chart setting forth these differences is attached as Appendix C . We believe that all will readily be resolved by the interested parties.

II. **Jury Selection and Service (Title II).**

Title II makes several technical amendments to the Jury Selection and Service Act of 1968, as amended (hereinafter referred to as the "Act"), for the purpose of improving the administrative operation of the jury system in the United States district courts. Section 201 provides that Title II may be cited as the "Jury System Improvements Act of 1987". No change is made in the underlying policy that juries shall be selected at random from a fair cross-section of the community through the use of random and objective selection procedures.

Section 202 amends in two regards the provision governing the temporary excuse of jurors appearing in clause (1) of 28 U.S.C. § 1866(c). First, it provides that temporary excuses on the grounds of "undue hardship or extreme inconvenience" may not only be granted by the court, but also, if the court so authorizes, by the clerk of court. Second, at the conclusion of a juror's temporary excuse period, courts are given the choice of either resummoning the person so excused or reinserting the name of such person back into the qualified jury wheel for possible resummoning. Either of these two changes may be implemented only by affirmative action of the district court; that is, the court's selection plan must specifically provide that the clerk may grant temporary excuses and that the names of excused persons are to be reinserted into the qualified jury wheel. In the absence of such provisions, only the court may grant temporary excuses, and persons so excused must automatically be resummoned.

The purpose of the first change is to promote administrative convenience and reduce unnecessary burdens placed upon the courts. It has long been recognized that a significant number of requests for excuse on the grounds of "undue hardship or extreme inconvenience" are clearly legitimate. Upcoming vacation plans, business travel, and medical operations are typical examples of such legitimate excuses. In these situations, obtaining judicial approval of each request for excuse is a needless and burdensome formality; it will enhance the administration of the jury system to permit clerks to grant such excuses in their discretion. In fact, some courts by practice already delegate this task to clerks of court, but the cases leave no doubt that this is technically improper under existing law. *See, e.g., United States* v. *Evans*, 526 F.2d 701 (5th Cir.), *cert. denied*, 429 U.S. 818 (1976); *cf., United States* v. *Maskeny*, 609 F.2d 183 (5th Cir. 1980). Although many decisions have been "liberal" in forgiving errors in this regard, in one case an indictment was dismissed where a clerk, without the knowledge of the chief judge, dismissed 31 out of 77 prospective members of a grand jury. *United States* v. *Hill*, 480 F.Supp. 1223 (S.D. Fl. 1979).

To avoid needless challenges and to enhance administrative convenience, this section thus permits, although it does not require, courts to authorize clerks to grant temporary excuses. It should be emphasized that any authority so delegated is to be exercised strictly "under the supervision of the court," thus preserving the court's ultimate control over the process. A court may, for example, impose limits on a clerk's discretion, only permitting him to grant excuses requested because of travel or illness, and requiring that all other requests be referred to the court. Even with a broad delegation of authority, however, a clerk would still look to the court for guidance in difficult situations. Furthermore, were a pattern of abuse to develop, such as a clerk granting too many excuses, the court is free to revoke the clerk's authority in the plan.

In a similar vein, this section also increases courts' discretion regarding the resummoning of persons so excused. Under current law, any person granted a temporary excuse must be summoned again at the conclusion of the excuse period. Many courts report, however, that this requirement imposes significant administrative burdens, and requires the use of complex tickler files to keep track of the many persons who are granted temporary excuses under this section. They believe it would be preferable (and not inconsistent with the policies of the Act) to simply reinsert the names of such persons into the qualified jury wheel, making them eligible for resummoning. This amendment gives courts this discretion.

As with the first change, courts retain sufficient control to ensure proper administration in this area. If a court were to find, for example, that too many persons were requesting excuses in the hope that they would permanently escape service after being reinserted into the qualified wheel, the court could simply amend its plan and reimpose automatic resummoning of such persons.

Section 203(1) amends 28 U.S.C. § 1863(b)(3) to make clear that persons other than clerks or jury commissions may be authorized to perform selection procedures under a court's jury selection plan.

Under current law, the selection of the names of potential jurors is to be performed by the "jury commission or clerk," and presumably the jury commission or clerk may delegate this function only to the staff under his or her direct supervision. In many courts, however, it has been found that personnel outside the judiciary, such as GSA computer technicians, private computing firms, or employees of State governments which provide lists of registered voters, can perform these functions, under the "detailed procedures" specified by the court, more expeditiously and economically than court personnel. Accordingly, this amendment permits courts to authorize clerks or jury commissions to delegate jury selection functions in appropriate situations to such non-court personnel. One recent case has criticized a district court for this type of delegation under current law, United States v. Savides, 787 F.2d 751 (1st Cir. 1986), and so this amendment resolves any ambiguity as to the propriety of this obviously advantageous administrative practice.

This is a good point in the discussion to bring to the attention of the Subcommittee two amendments to S. 1482 reflecting Judicial Conference consideration of jury selection issues after the bill was introduced. These amendments and an accompanying detailed explanation are attached hereto as Appendix D.

The first amendment deals with the delegation of certain functions to non-court personnel. As currently drafted, section 203(1) of the bill amending section 1863(b) would technically authorize delegation to non-court personnel of functions relating to the drawing of names only from voter registration lists and other source lists for deposit into the master jury wheel. In that this limitation only recently came to our attention, the Judicial Conference at its September 1987 session endorsed an additional and similar amendment to 28 U.S.C. § 1865 and other appropriate sections of the Jury Selection and Service Act to authorize delegation in one other needed circumstance. Specifically, the proposed new amendment would authorize courts to delegate to non-court personnel functions relating to the drawing of names from the master wheel for placement into the qualified wheel. This amendment would most likely be exercised in connection with the still-experimental use of optical scanning equipment in non-court locations to process qualification questionnaires.

The second amendment to S. 1482 relates to classes of persons barred from jury service under 28 U.S.C. § 1863(b)(6). Section 203(2) in S. 1482 as introduced limits the classes of persons barred or exempt from jury service to the three categories specifically mentioned in section 1863(b)(6) of the Act: those in active service in the Armed Forces; members of fire and police departments; and public officers of Federal or State governments. This changed the paragraph to eliminate the authority for the courts to expand upon the three enumerated classes. It should be noted that this provision differs from the specification of groups or classes whose members shall be excused on individual request under 28 U.S.C. § 1863(b)(5); it concerns those groups whose members are barred from service even if they wish to serve.

Currently, section 1863(b)(6) authorizes each district court to exempt other groups of persons or occupational classes if it is found "that their exemption is in the public interest and would not be inconsistent with sections 1861 and 1862 of this title." Despite this language, the Judicial Conference Committee on the Operation of the Jury System in 1974 and in 1980 concluded that the three categories specified in section 1863(b)(6) should be considered exclusive, and should not be expanded upon by district courts in their plans. Although it appears that few, if any, courts specify any additional classes of exemptions, the Committee thought it desirable to ensure that the classes of exempt persons would be limited to the three referred to in section 1863(b)(6), so that the responsibilities and burdens of jury service would be distributed more evenly.

Upon further reflection, the Conference decided at its March 1988 meeting to recommend that the bar to jury service be further limited to active duty members of the armed forces, thereby opening up such service to members of the police and fire departments and to "public officers." In essence, the Conference concluded that there was no sound reason to depart from the general policy of universal service by automatically excluding these two classes of persons. As noted above, a more detailed explanation of the amendment is set forth in Appendix D.

Sections 204 and 205 make minor technical amendments. Pursuant to section 1864(a) of title 28, the clerk or jury commission is required to prepare an alphabetical list of the names drawn from the master jury wheel, although this list "shall not be disclosed" except as provided in the court's selection plan or as necessary in the event of a challenge. This alphabetical list is also referred to in section 1865(a), which requires the clerk to record all "unqualified" determinations both on the qualification questionnaires of individual jurors and on the alphabetical list.

Many courts report that no apparent good is served by the mandatory preparation of this list, in that it is rarely referred to and in fact is not permitted to be routinely disclosed. Furthermore, the preparation of this list is extremely burdensome, especially in those automated courts in which the master wheel itself is not alphabetized.

To ease unnecessary administrative burdens, these amendments eliminate the mandatory preparation of the list, and, in lieu thereof, merely allow clerks or commissions to generate an alphabetical list of names in the event access to such a list becomes necessary and when so ordered by the court.

Section 206 adds a new section 1878 to the Act to authorize the Judicial Conference to experiment with new jury selection procedures on a limited basis. This amendment is needed because the Act currently does not tolerate any deviations from prescribed procedures, no matter how well-intentioned in the interest of research and improvement. As a result, the Act precludes the investigation and testing of possibly superior procedures. For example, it was recently proposed to the Judicial Conference Committee on the Operation of the Jury System that courts be authorized to experiment with combining qualification and summoning procedures into one step, so as to reduce both the clerical time and mailing expense inherent in the two-step qualification and summoning procedure currently provided for at law. This procedure has been effectively used in many State courts. While the committee was interested in learning what tangible benefits would result from this innovation in the Federal courts, it felt constrained against authorizing such an experiment because the Jury Selection and Service Act clearly requires separate qualification and summoning procedures and does not provide any latitude for technical deviations from these procedures. Despite the fact that this and other innovations may come to enhance the efficiency with which jurors are summoned for service in the Federal courts, they are now unlikely ever to be implemented because they can never be tested under present law.

To remedy this problem, the proposal would empower the Judicial Conference to authorize the experimental use of new selection procedures notwithstanding their inconsistency with technical provisions of the Act. It must be emphasized that this proposal permits experimentation only with the technical or administrative provisions of the Act, and under no circumstances would the basic policies of the Act be transgressed. To ensure that experiments would not have any adverse impact on randomness and cross-sectionality, it is required that the Judicial Conference certify that no violations of the Act's policies result from such experiments, that the number of courts authorized to participate in experiments be specified at a number no greater than ten, and that no experiment be conducted for longer than two years. The Conference is to terminate an experiment if it determines that any substantive policy of the Act is being violated or if there is other appropriate cause therefor. Furthermore, it is made clear in this proposal that even a successful experiment may be permanently implemented only through formal legislative action, thus preserving to Congress the right to make the final judgment as to the efficacy of and need for revisions in statutory procedures.

The proposal further provides that no challenge would lie due to the fact that a jury is selected pursuant to experimental procedures implemented under this section. This would ensure that the actions taken by juries empaneled during experiments would possess full legal validity.

Jury selection is an important and expensive process. The ability to engage in carefully constructed experiments is highly desirable if the costs and time involved in jury selection are to be reduced. We urge the Subcommittee to authorize such experiments.

III. Court-Annexed Arbitration (Title III).

Title III of S. 1482 provides that "a program of court-annexed arbitration may be established, on an experimental basis, in each judicial district by local rule with the approval of the judicial council of the circuit." This would provide express statutory recognition of a decade of pilot arbitration activities and expand the program to potential participation by every district. This program, at the time it was adopted, reflected the Judicial Conference view that both the legislative and judicial branch needed to know more about how such programs would work before incorporating them into standard court processes or mandating them by law. Therefore, the Judicial Conference proposed this program, which would be flexible and experimental in nature, authorized but largely unfettered by statutory restrictions, and in accordance with guidelines and procedures prescribed by the Judicial Conference of the United States.

In the meantime, as experience has been gained under current programs, Congressman Kastenmeier has proposed legislation that offers a more structured approach. This legislation is pending before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice as Title III of H.R. 3152, attached hereto as Appendix E. It would statutorily authorize experimental arbitration programs in thirteen districts and ten additional districts to be approved by the Judicial Conference. At the request of Congressman Kastenmeier, in September 1987 (after S. 1482 had been introduced) the Judicial Conference considered whether enough experience has been gained under current pilot arbitration activities to justify a more structured system and approved the provisions of H.R. 3152 if amended with suggested changes. These changes are intended, among other things, to carry forward certain arbitration procedures used in some of the current court-annexed pilot programs in the Federal courts, and clarify that, in bankruptcy, only adversary proceedings will be subject to arbitration. This will enable the research projects already underway to continue without skewing the results of their past efforts. The proposed amendments are annotated onto the copy of Title III of H.R. 3152 attached as Appendix E noted above.

The Judicial Conference's proposed changes also include:

(1) Raising the dollar amount of money damages allowable in arbitration to $150,000 and requiring documentation of the amount of damages. Some experimental programs use $150,000 as the maximum amount.

(2) Allowing the court to extend the time period before which an arbitration hearing must begin if the case so warrants it. This allows a time adjustment in extenuating circumstances.

(3) Requiring a bad faith demand for a trial de novo before costs and attorney fees can be assessed for such trial following arbitration by consent of the parties.

(4) Subjecting the compensation of arbitrators to limits set by the Judicial Conference; some standard should be set limiting the compensation.

(5) Extending the report date of the Federal Judicial Center from four to five years. This will better enable the Center to have the time required to complete its research. The Center will probably finish before this time, but the extension will provide for extenuating circumstances.

We are still reviewing other comments made in the course of the hearings on this subject in the House. We pledge to work with this Subcommittee and its staff to attain the most effective Federal arbitration program possible.

IV. District Court Executive (Title IV).

Title IV of S. 1482 would authorize a district court executive program. At its March, 1985 meeting, the Judicial Conference reviewed a Federal Judicial Center report on the district court executive pilot project and recommended that statutory authorization for permanent positions be sought. This proposal is designed to permit the large district courts, those having eight or more permanent judges, to appoint a court executive with the approval of the judicial council of the circuit. The district court executive would exercise those administrative powers and perform those administrative duties delegated by the judges of the district court. The duties would be similar to those performed by the circuit executives.

Since another proposal discussed below recommends amending 28 U.S.C. § 332 to eliminate the board of certification procedure applicable to circuit executives and place the responsibility of recruiting candidates for such positions on the circuit judicial councils, the cross-reference to the certification procedures in subsection (b) should be dropped and the statutory selection criteria in section 332 should be adopted for district court executives. This can be done by amending the new 28 U.S.C. § 756 proposed in this title by (1) inserting after the first sentence in subsection (a), "In appointing a district court executive, the district court shall take into account experience in administrative and executive positions, familiarity with court procedures, and special training."; (2) deleting subsection (b); and (3) redesignating subsequent subsections accordingly.

V. Federal Judicial Center (Title V).

The provisions of title V of S. 1482 relate to recommendations of the Board of the Federal Judicial Center transmitted to Congress on May 7, 1987, as Title V of the "Judicial Branch Improvements Act of 1987." They are strongly supported by the Board.

1. Federal Judicial Center Foundation (Part A).

Part A of Title V provides statutory authority to accept gifts donated for the purpose of aiding or facilitating the work of the Federal Judicial Center. This would be done through a private nonprofit corporation specially created for that purpose.

A seven-member committee appointed by the Chief Justice carefully reviewed the issue of gift authority for the Center. The members of the committee were: Honorable Philip W. Tone, former judge of the United States Court of Appeals for the Seventh Circuit, chairman; Honorable Peter T. Fay, judge of the United States Court of Appeals for the Eleventh Circuit; Honorable Damon J. Keith, judge of the United States Court of Appeals for the Sixth Circuit; Honorable David S. Nelson, judge of the United States District Court for the District of Massachusetts; Ambassador Sol M. Linowitz; former Solicitor General and Dean Erwin N. Griswold; and Robert S. Banks, Esquire.

The committee concluded that the work of the Center would indeed benefit if it were permitted to use gifts of money, personal property such as books or papers from judges' or scholars' collections, or services from scholars or other experts who wished to donate their time. The committee recommended, however, that in order to safeguard both the independence of the judiciary and the appearance of independence, the Board of the Center be sufficiently insulated from any procedure for accepting and receiving gifts. It was thought that separating the authority to accept and receive gifts from the Center's authority to utilize and administer gifts would avoid any real or perceived problems that might arise from the presence of judges on the Center's Board.

Thus, in accordance with the recommendation of the committee, the Center proposes that the authority to accept and receive gifts be granted to a separate, private foundation, directed by an independent board, none of whose members would be sitting judges. The foundation would have sole authority to accept or reject gifts, while the Center would have responsibility for administering and determining how the gifts will be used. Under the proposed legislation, the foundation would not be permitted to accept conditional gifts, but donors could express some preference for the use of their gifts, such as designating gifts to support specific projects previously approved by the Center's Board. Neither the Center nor the foundation would solicit gifts.

Funds acquired by gift would not be used to augment the Center's appropriation, but to support specific programs or projects for which appropriated funds are not available and would not be sought. These projects might include, for example, developing and maintaining a history program for the judicial branch, as proposed in the section that follows, by preparing oral histories of developments in the courts and judicial administration, and collecting and archiving manuscripts, portraits and other artifacts; having foreign or state judges-in-residence or scholars-in-residence; presenting satellite educational programs for lawyers as well as judges; and expanding the audience served by the Center's video tape library to include lawyers, students and interested members of the public.

Members of the foundation board would not receive compensation for their service, but would be reimbursed for expenses. The Center would provide all routine and administrative support and other facilities required by the foundation. It is anticipated, however, that the need for such support, as well as the foundation's expenses, would be de minimis.

2. Authority to Implement History Program (Part B).

Part B of title V of the bill amends section 623(a) of title 28, United States Code, dealing with the duties of the Board of the Federal Judicial Center, by adding a new paragraph (7) that directs the Board to "conduct, coordinate, and encourage programs to collect, preserve, and make available materials relating to the history of the Judicial Branch of the United States government." This amendment, in effect, confers upon the Federal Judicial Center the task of establishing a history program for the Federal Judiciary. This proposal is identical to a recommendation of the Board of the Federal Judicial Center and is supported here.

The extent of historical preservation in the Judiciary is not only very small, there is also extremely limited information available about the activities that do exist. A survey of circuit executives turned up only two such activities. A follow-up turned up several more projects at the district level that were not known at the circuit executive level. Doubtless, the total activity is still small, but it is larger than generally known. Material that cannot be found is almost as great a loss as material that has been lost or destroyed.

Preservation and use of historical material is a useful and valid service to contemporary work. Knowing how and why things came to be the way they are contributes substantially to any assessment of current effectiveness and to appreciating the promise of proposals for change. Though the utilitarian side of historical materials in the Judiciary may differ from applications in other public endeavors, there is nonetheless real need and real potential.

A history program for the Judicial Branch might extend to the following elements:

(a) A union catalog that would locate and identify existing materials, ongoing projects, and planned programs relating to Federal judicial history.

(b) An oral history program involving both support for others and activities carried on by the staff.

(c) An archiving program to obtain and maintain papers, manuscripts, and other materials.

(d) A written history project that might support work to cover neglected areas or coordinate work addressing specific needs.

(e) A judicial museum for collecting and displaying artifacts, manuscripts, portraits, and other objects.

A history program for the Judiciary is related to the proposal in Section 501 of this title to provide a mechanism for the Center to accept gifts. A history program would clearly need to be able to accept gifts of manuscripts, diaries, and other forms of records as well as artifacts.

3. Training for Persons Outside the Judicial Branch (Part C).

Part C of title V of the bill amends section 620(b)(3) of title 28, United States Code, and permits the Federal Judicial Center to encompass within its training program non-government personnel whose participation in such programs would improve the operation of the Judicial Branch. A number of district courts now have programs under which members of the private bar serve as mediators or arbitrators in an effort to resolve litigation without the necessity of trial, but there is no authority to expend Judicial Center funds in programs to improve their mediation or arbitration skills. It would clearly be advantageous to the Judiciary if the Center were able to support such programs. There may also be limited situations in which it would be appropriate to train members of the private bar who agree to represent indigent defendants but whose Federal court criminal experience is limited. This amendment would permit expenditure of Center funds in these types of situations clearly of benefit to the operation of the Judiciary. This proposal also has been approved by the Board of the Federal Judicial Center and is supported here.

4. Appointment and Compensation of the Deputy Director (Part D).

Part D of title V of the bill amends section 624 of title 28, United States Code, relating to powers of the Board of the Judicial Center, to authorize the Board to appoint, fix the duties of, and remove the Deputy Director of the Federal Judicial Center. This amendment conforms the Federal Judicial Center to parallel provisions in 28 U.S.C. § 601 making the Deputy Director of the Administrative Office of the United States Courts an express statutory position subject to removal by the Supreme Court. This section is supported by the Board of the Federal Judicial Center.

This part also amends section 626 of title 28, United States Code, to add a new sentence that would provide for compensation of the Deputy Director of the Federal Judicial Center at the same rate as that of the Deputy Director of the Administrative Office. This subsection also makes technical changes to the section title and appropriate chapter analysis.

VI. Miscellaneous Provisions (Title VI).

Section 601. Divisional Venue in Civil Cases.

Section 601 would repeal 28 U.S.C. § 1393, which presently provides for divisional venue in civil cases. Divisional venue in criminal cases was abolished in 1966 as a result of an amendment to Rule 18 of the Federal Rules of Criminal Procedure. The rationale for eliminating divisional venue for civil cases is essentially the same that underpinned the change in divisional venue in criminal cases. As noted by the Advisory Committee on Criminal Rules:

> The former requirement for venue within the division operated in an irrational fashion. Divisions have been created in only half of the districts, and the differentiation between those districts with and those without divisions often bears no relationship to comparative size or population. In many districts a single judge is required to sit in several divisions and only brief and infrequent terms may be held in particular divisions. As a consequence under the original rule there was often undue delay in the disposition of criminal cases—delay which was particularly serious with respect to defendants who had been unable to secure release on bail pending the holding of the next term of court.

The Judicial Conference concluded that the change in divisional venue for criminal cases has not resulted in adverse consequences to the litigants or to the fair and expeditious administration of justice. Accordingly, the Conference approved the recommendation to eliminate divisional venue for civil cases as well (Conf. Rept., March 11-12, 1980, p. 19).

Section 602. Registration of Foreign Judgments.

Section 602 amends 28 U.S.C. § 1963 to give the district court and the Court of International Trade, in entering a judgment in an action for the recovery of money or property, the discretion for good cause shown to permit registration of the judgment in a foreign jurisdiction pending appeal; merges section 1963A into section 1963; and repeals section 1963A.

28 U.S.C. § 1963 currently appears to authorize the registration of a judgment of a district court in a foreign jurisdiction only when the judgment has become final by appeal or expiration of the time for filing an appeal. The judgment is a lien on the property of the judgment debtor which is located within the district. A judgment debtor, who is an appellant, may obtain a stay of execution under Rule 62(d) of the Federal Rules of Civil Procedure by giving a supersedeas bond. Section 1963A is a parallel provision to section 1963 covering judgments of the Court of International Trade.

If the property of the judgment debtor is located in, or is removed to, another jurisdiction pending appeal, the judgment creditor cannot obtain a lien in the foreign jurisdiction until after the appeal process is completed and thus may be effectively unable to enforce the judgment if assets have been dissipated. Some courts have read section 1963 literally and have refused registration in a foreign jurisdiction while an appeal is pending. Other courts have permitted registration in a foreign jurisdiction.

Although these circumstances do not often occur, the Judicial Conference concluded that a judgment debtor should not be permitted to hide assets in a foreign jurisdiction and that the district court entering the judgment should be given discretion to permit registration in a foreign jurisdiction pending appeal, but only upon a showing of good cause. Since the rationale for changing section 1963 for district court judgments is equally applicable to judgments of the Court of International Trade under section 1963A, the proposed amendment merges section 1963A into the new section 1963 and repeals the current section 1963A.

Section 603. Diversity in Cases Involving Representative Parties.

Section 603 amends 28 U.S.C. § 1332(c) to provide that, for the purposes of 28 U.S.C. §§ 1441 (removal) and 1332 (diversity of citizenship), the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

Under current law, the citizenship of a representative party in a civil action is the citizenship of the representative rather than the citizenship of the person represented. In some jurisdictions, attorneys seek the appointment of out-of-state representatives in order to create diversity of citizenship so that civil actions involving the interest represented may be brought in Federal, as well as State courts. The Judicial Conference sees no sound reason why the citizenship of a representative party should not be deemed to be the same as the citizenship of the party represented in an action involving an infant, an incompetent person, or an estate.

Without intending to detract in any way from the previous Judicial Conference action recommending the abolition of diversity jurisdiction (Conf. Rept., March 1977, p. 8), this section makes a modest and logical alteration in the determination of citizenship of a representative party for the purpose of diversity jurisdiction.

Section 604. Leave Act Amendments Relating to Bankruptcy Judges, Magistrates and Law Clerks.

Paragraphs (1) and (2) of section 604(a) would amend 28 U.S.C. SS 153 and 631 to make it explicit that bankruptcy judges and United States magistrates are exempt from the provisions of the Federal Leave Act (5 U.S.C. SS 6301-6323).

Bankruptcy judges and United States magistrates have traditionally been considered judicial officers not subject to the Leave Act. The bases for this status are similar to those asserted for exemption of Presidential appointees or Congressional employees: Such officials are high-level government officials for whom hour-by-hour accountability is inappropriate and unnecessary; their hours and duties are not subject to a fixed schedule; or the type of position is such that they are never completely divested of their responsibilities and actually are on duty at all times. Bankruptcy judges and magistrates occupy positions meeting all of these criteria.

Following technical amendments to the Leave Act in 1978, a question has been raised whether the statutory exemptions are elastic enough to continue the prior practice whereby bankruptcy judges and magistrates are administratively excluded therefrom. Concluding that legislation is desirable to expressly ratify this long-standing treatment of these judicial officers, paragraphs (a)(1) and (2) are included in the bill to accomplish that result.

Paragraphs (a)(3) and (4) of section 604 would amend 28 U.S.C. SS 156, 634, 712, 752, and 794 to explicitly exempt law clerks for judges on the courts of appeals, the district courts, the Claims Court and the law clerks to bankruptcy judges and magistrates from the provisions of the Federal Leave Act. Traditionally, regulations promulgated on behalf of the Judicial Conference by the Director of the Administrative Office authorized each judge to elect whether his or her personal staff would be covered by the Leave Act. The Judicial Conference in September 1983 established the policy that all new secretaries to judicial officers shall be placed under the Leave Act, thereby reflecting legal opinions to the effect that prior amendments to the Act had the effect of applying the Leave Act to all employees of the judiciary, except Presidentially appointed judges. The appropriate status of law clerks was held for further study. After further study, the Judicial Conference revisited the issue. It determined that discretionary exemption of law clerks from the Leave Act could not be supported under present law, but that mandatory coverage of law clerks under the Leave Act was inappropriate. The Conference adopted the position that legislation be proposed to exclude law clerks from the Leave Act, unless specifically included by the appointing judge or by local rule of court. Conf. Rept., September 1986, p. 57. This paragraph implements this proposal.

I must point out that the qualifying language "unless specifically included by the appointing judge or by local rule of court" was inadvertently omitted from the draft legislation transmitted to Congress on behalf of the Judicial Conference and, therefore, was not included in S. 1482. This omission can be corrected by adding this language set off with a comma after the term "Code" on page 25 of S. 1482 at lines 8 and 13.

Subsection (b) makes the changes made by this section effective on the date of enactment of this Act.

Section 605. Cost-of-Living Adjustment of Annuities Payable Under 28 U.S.C. SS 611 and 627.

Section 605(a) amends 28 U.S.C. SS 611 and 627 so as to apply the cost-of-living adjustment provisions applicable to regular civil service retirement annuities under 5 U.S.C. S 8340 to annuities that may be elected by the Directors of the Administrative Office of the United States Courts and of the Federal Judicial Center, as well as the Administrative Assistant to the Chief Justice. The Judicial Conference has recognized for many years that the retirement provisions applicable to these key positions should be upgraded to attract and hold the most qualified individuals. In 1974, the Conference made this observation (Conf. Rept., March 7-8, 1974, pp. 52-53):

> In approving these recommendations [to improve the retirement system for the Directors of the Administrative Office and of the Federal Judicial Center and the Administrative Assistant to the Chief Justice], the Conference noted that the present statute makes no provision for cost-of-living increases and that while the proposed legislation would not affect present incumbents of the positions, the retirement provisions are not geared to attract and hold qualified individuals who do not have long civil service retirement credit or other types of retirement benefits, and that the statute should be amended to bring the retirement benefits in line with similar benefits in comparable positions.

Protection of annuities elected under 28 U.S.C. SS 611 and 627 from run-away inflation on the same basis as that of the civil service retirement system is a matter of fundamental fairness that should be addressed by the Congress.

Subsection (b) of this section provides that the amendments to 28 U.S.C. SS 611 and 627 with respect to cost-of-living adjustments shall apply to such increases that go into effect on or after the date of enactment with respect to annuities being paid or becoming payable on or after such date.

Section 606. Military Retirement Pay for Senior Judges.

Section 606(a) amends 28 U.S.C. S 371 to permit senior judges to receive military retired or retainer pay to which they would be entitled on the basis of regular or reserve military service. The Judicial Conference approved this proposal in September 1985 (Conf. Rept., p. 44). In considering the merits of the subject, the Conference noted:

> Since federal judges appointed to hold office during good behavior continue to occupy the office in the legal sense after retirement from regular active service under 28 U.S.C. 371(b), 5 U.S.C. 5532(c) precludes senior judges from receiving any military retired pay to which they would otherwise be entitled. * * * [S]ection 5532 is inconsistent with 5 U.S.C.

8344(f) (which requires the suspension of civil service retirement annuities to active judges but authorizes their resumption upon judicial retirement), and could provide an incentive for retirement from the judicial office under 28 U.S.C 371(a) rather than to senior status under 371(b), thereby depriving the judiciary of the invaluable services of senior judges.

Subsection (b) of this section makes it clear that this military retirement amendment will apply to any justice or judge who retires, or has retired, from the judicial office or from regular active service on or after the effective date of 5 U.S.C. § 5532(c), and to whom that section would otherwise be applicable.

Section 607. Certificate of Probable Cause Under 28 U.S.C. § 2255.

Section 607(a) amends 28 U.S.C. § 2255 to provide that an appeal from an order entered on a motion to vacate, set aside or correct a sentence thereunder may not be taken unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause. Subsection (b) encompasses appropriate conforming amendments to Rule 22 of the Federal Rules of Appellate Procedure.

This procedure parallels a similar requirement in 28 U.S.C. § 2253 for an appeal from the final order in a habeas corpus proceeding where the detention complained of arose out of process issued by a State court. The certificate requirement is designed to avoid the burden of a decision on the merits by an appellate panel in the absence of a prior determination by a district or appellate judge that some basis for the appeal exists. There appears to be a sound basis for applying such a requirement to 28 U.S.C. § 2255 motions, as well as State habeas corpus applications.

The Judicial Conference voted to support the creation of a certificate requirement for appeal of section 2255 motions at its March 1986 Proceedings. See Conf. Rept., pp. 29-30.

Subsection (c) provides that the amendments made by this section shall apply to section 2255 proceedings commenced in the district courts on or after the 90th day after the date of enactment of this Act.

Section 608. Exhaustion of State Remedies Under 28 U.S.C. § 2254.

Section 608(a) would amend 28 U.S.C. § 2254 to expressly provide that an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State. The Judicial Conference endorsed this proposal in its September 1985 Proceedings. See Conf. Rept., p. 81.

While this approach is not literally precluded by the current language of 28 U.S.C. § 2254(b), the courts differ from case to case in their strict adherence to the exhaustion doctrine. Compare, e.g., *Trantino* v. *Hatrack*, 563 F.2d 86, 95-97 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978) (stricter view) with *Kelly* v. *Maroney*, 414 F.2d 1228, 1231 (3d Ci[illegible]69) (broader view). The strict view with respect to *denials* has significant costs without furthering any objective of the exhaustion doctrine. It is generally conceded that many State habeas corpus applications are frivolous. Consigning these cases to the round trip back to the States for exhaustion and ultimate return to the Federal system would waste substantial resources without serving any useful purpose. The policies supporting exhaustion — comity, deference to State processes, and to allow State courts to correct errors in State proceedings — are not infringed by the denial of frivolous petitions by the Federal courts prior to exhaustion. Thus, substantial savings in both the State and Federal systems can be accomplished without impairing the Federal-State interests protected by the exhaustion doctrine.

Subsection (b) provides that the amendment made by this section shall take effect 90 days after the date of enactment of this Act.

Section 609. Amendments to Conform 28 U.S.C. §§ 611 and 627 to the Federal Employees' Retirement System Act of 1986.

Section 609(a) makes certain changes to 28 U.S.C. §§ 611 and 627 needed to mesh these provisions with the newly enacted Federal Employees' Retirement System Act of 1986 (Public Law 99-335, enacted June 6, 1986).

As noted under section 605 above, 28 U.S.C. §§ 611 and 627 contain special retirement provisions for the Directors of the Administrative Office and of the Federal Judicial Center, as well as the Administrative Assistant to the Chief Justice. Both sections, as presently worded, permit a Director to waive coverage under 5 U.S.C. chapter 83, subchapter III (the Civil Service Retirement System) and to elect coverage under section 611 or 627, as appropriate. Sections 611 and 627 also state that a Director's election of the special retirement provision does not operate to foreclose any deposit right under 5 U.S.C. § 8334 in order to reclaim civil service retirement credit for years of service as Director if an incumbent does not serve long enough for annuity eligibility under sections 611 or 627. Because of the recent passage of the Federal Employees' Retirement System Act of 1986, the references in sections 611 and 627 to chapter 83 are no longer adequate. Depending upon the circumstances, a Director appointed after January 1, 1984 could fall either under chapter 83 or under the new Federal Employees' Retirement System in 5 U.S.C. chapter 84. Thus, a Director electing section 611 or 627 coverage must properly waive either chapter 83 or chapter 84, whichever is specifically applicable to his or her situation.

In addition, the deposit right mentioned in sections 611 and 627 should be amended to refer to chapter 84 as well as to chapter 83. The sentences in this section concerning deposits under chapters 83 and 84 are worded differently because chapter 83 explicitly permits an employee to make deposits for any periods of Federal service for which retirement deductions were not made, while chapter 84 does not. Thus, the sentence concerning deposits under chapter 84 affirmatively states that a deposit right exists, and establishes the amount of deposit by reference to the amount that would have been withheld from a Director's pay as a retirement contribution if the Director had not elected the coverage of section 611 or 627.

Amendments made by this section also permit a Director electing section 611 or 627 coverage to participate in the Thrift Savings Plan established by chapter 84, which allows an employee to deposit up to 10 percent of his pay into the tax-deferred investment plan, with matching Government contributions of up to 5 percent of his pay.

Finally, the amendments to section 611 will apply to the Administrative Assistant to the Chief Justice. 28 U.S.C. § 677 provides a person in this position with eligibility to elect the retirement benefits offered by 28 U.S.C. § 611.

Subsection (b) of this section provides that the amendments made by the section shall apply to persons holding the offices of Director of the Administrative Office of the United States Courts, Director of the Federal Judicial Center, and Administrative Assistant to the Chief Justice on the date of enactment. This subsection indicates that the bill applies to incumbent Directors, to make it entirely clear that they have the right to make deposits in the event that they leave their positions before retirement, and that they may participate in the Thrift Savings Plan.

Section 610. Judicial Disqualification.

This section amends 28 U.S.C. § 455 by adding the following new subsection:

> (f) Notwithstanding the foregoing provisions, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance, after the matter was assigned to him, of a party in which he individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest (other than an interest that could be substantially affected by the outcome), a waiver of disqualification may be accepted from the parties; in the absence of waiver, disqualification is not required if the judge determines that the public interest in avoiding the cost of delay or reassignment outweighs any appearance of impropriety arising from his continuing with the matter to completion.

The proposal was approved by the Judicial Conference in September 1980 (See Conf. Rept., p. 81) and has been repeatedly reaffirmed by the Conference during intervening years.

This proposal would remedy a specific problem which has arisen as a consequence of existing disqualification requirements and their application in class action cases. Today, under section 455 of title 28, United States Code, a judge must "disqualify" himself or herself in any case in which he or she — or members of his or her family — are parties to the case or have a financial interest in a party to the case. In most cases determining whether a financial interest cognizable under the statute exists is not difficult. In complex multidistrict class action cases, however, a full list of all members of a class may not become available until long after litigation has commenced, and a judge will be unable to determine whether a cognizable interest exists until then. When that happens now, the case must be assigned to a different judge, an event which disrupts the efficient administration of the case and can be very costly to litigants.

In his introductory remarks on H.R. 3044 on July 18, 1985 the Chairman of the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice cited, as an example of the problem, the case of In re Cement and Concrete Antitrust Litigation, 515 F. Supp. 1076 (D Ariz. 1981). Because the judge's wife owned stock in 7 of 210,000 "class members," with a financial interest estimated at $4.23 to $29.70, the judge had to step out of the case in its sixth year, after having entered 75 pretrial orders. Obviously corrective amendments are desirable.

Accordingly, 28 U.S.C. § 455 would be amended to modify the automatic disqualification provisions to permit a judge to weigh the public interest in completing the litigation in determining whether to recuse himself or herself and also to permit a waiver of disqualification. Recusal would continue to be automatic and not waivable if the judge, his or her spouse, or a minor child residing in the household had an interest in the controversy that could be substantially affected by the outcome. Subsection (b) provides that the amendment made by this section shall take effect upon enactment.

Section 611. Service of Article III Judges on Territorial Courts.

With the gradual termination of the trust known as the Trust Territories of the Pacific Islands, the United States has entered into compacts of free association with the governments of the Federal States of Micronesia, the Marshall Islands, and the Republic of Palau. These three compact states do not have enough full-time judges to staff their entire court structure.

In order to permit Ninth Circuit judges to sit by designation on such courts, as was done when the islands were administered by the United States under the trust territories government, the Judicial Conference at the March 1987 meeting endorsed enactment of legislation by the Congress which would permit judges of the Ninth Circuit, with the permission of the chief judge of the circuit, to serve on the courts of Micronesia, the Marshall Islands, and Palau, if so requested by an authorized official of the compact state.

Section 612. Circuit Judicial Conference Amendments.

Section 612 amends 28 U.S.C. § 333 relating to judicial conferences of the circuits to require the chief judge of a circuit to convene a conference of the circuit biennially (rather than annually) and to authorize a chief judge as a matter of discretion to convene judicial conferences on an annual basis as at present. This proposal, with only technical differences, was approved by the Judicial Conference in March 1986 as one of a number of budget enhancing program adjustments that the judiciary could implement on a selective basis without undue detriment to the business of the courts.

Section 613. Incentive Awards.

Section 613 amends 28 U.S.C. § 604(a)(5) (Duties of the Director of the Administrative Office) to specify as one of those duties the establishment of a program of incentive awards for employees of the courts.

Personnel managers have long realized that recognition and reward of superior performance by an employee provide incentive for other employees to improve their performance and enhance morale. The effect is generally an improvement of productivity. The Executive Branch has a comprehensive program for agencies to recognize superior performance, to reward valuable suggestions, and to acknowledge special contributions among their employees. That program appears to have worked well, and the Judicial Conference believes that the Judicial Branch would benefit from a similar program for its employees. The Office of Personnel Management reports that, for each dollar invested in awards in fiscal year 1985, almost $7 in savings and benefits were received. The benefit-to-cost ratio has consistently remained high year after year.

Currently, the judiciary has only a system for quality step increases in pay under the Judiciary Salary Plan. This program rewards an employee's sustained superior performance that is likely to continue. A quality step increase is an award of an increase in the employee's basic pay in advance of the time when the increase would normally become payable if the employee had merely maintained an acceptable level of performance. Thereafter, the employee continues to be eligible for further regular increases at the normal intervals — but measured from the date of the award of the quality step increase. Thus, this type of award has a long-lasting effect. Accordingly, its use is — and should be — limited to outstanding performance of the highest order.

Short of this type of award, there are many instances of performance which deserve special recognition but which cannot now be recognized under current provisions of law. A program similar to that in the Executive Branch, under which awards would be made to employees serving the courts, the Federal Judicial Center, and the Administrative Office, administered by the Administrative Office under regulations approved by the Judicial Conference, has real merit. The likely benefits of increased productivity and improved morale — as evidenced by the Executive Branch's program — would assist our continuing efforts in the Judicial Branch to handle the increasing workload fairly and expeditiously.

I would like to bring to your attention the necessity for a technical amendment to section 613. Since S. 1482 was introduced, it has been brought to our attention that amending paragraph (5) of section 604(a) of title 28 has the effect of arbitrarily limiting the application of the incentives program to the employees designated therein. This was not intended by the Judicial Conference. The defect can be cured by substituting the following for the textual part of section 613(a) of the bill:

> Section 604(a) of title 28, United States Code, is amended by inserting a new paragraph (6) after paragraph (5) as follows, and redesignating subsequent paragraphs accordingly:

"(6) Establish a program of incentive awards for employees of the Judicial Branch of the United States.".

Section 614. Judicial Immunity.

This section amends 42 U.S.C. § 1988 (The Civil Rights Attorneys Fees Act) to preclude awards of attorneys' fees against judges in the same instance when a judge could not be required to pay other money damages as a consequence of a lawsuit. In effect, it would eliminate from the scope of section 1988 the award of attorney fees against a State court judge in a suit to enjoin the judge in his or her official capacity with respect to a judicial function within the jurisdiction of the judge. Judge George Danielson testified before the Subcommittee on this subject on February 26, 1988, on behalf of the Judicial Conference. That testimony is incorporated herein by reference.

Section 615. Amendments to Waive Claims of Overpayment of Judicial Pay and Allowances.

Section 615 would amend 5 U.S.C. § 5584(g) to authorize the Director of the Administrative Office of the United States Courts to waive a claim for erroneous payment of pay or allowances against an employee of the Administrative Office of the United States Courts, the Federal Judicial Center and any of the courts set forth in section 610 of title 28, United States Code. In addition the Director would be defined by this amendment as "head of an agency" for purposes of this section. This lack of waiver authority has caused undue hardships for employees of the judicial branch. For example, in 1979, the Personnel Division of the Administrative Office erroneously paid a former secretary to a United States magistrate a within-grade increase one year early. She was advised of the resulting overpayment only after she had retired, when she learned for the first time that instead of receiving approximately $3,000 in a lump-sum distribution for unused annual leave, she would get virtually nothing. This had a devastating impact upon the secretary in that she had planned to use this refund to pay for a needed surgical operation.

As a legal matter, the secretary was not entitled to retain the overpayments she had received, although it is clear that the error was solely the fault of the agency and that she was perfectly justified in assuming it had computed her pay in an accurate manner. This would be an appropriate case for waiver in the interest of doing equity, but the Administrative Office at present is not statutorily permitted to waive this debt to the government, as are agency heads in the Executive Branch and officials of Congress.

A review of relevant authority reveals that the statutes authorizing waiver of claims for erroneous payments of pay and allowances are codified at 2 U.S.C. §§ 130c, 130d and at 5 U.S.C. § 5584. Section 130c of title 2, United States Code, deals exclusively with waiver of claims for erroneous payments by the Secretary of the Senate in respect of payments made by him. Section 130d of title 2, United States Code, deals exclusively with waiver of claims for erroneous payments by the Speaker of the House of Representatives in respect of payments made by the clerk of the House of Representatives. Neither has any applicability to the judicial branch of government.

Section 5584 of title 5, United States Code, invests the "head of an agency" with limited authority to waive a claim for erroneous payment of pay, or allowances, other than travel and transportation allowances and relocation expenses payable under 5 U.S.C. § 5724a, against an "employee of an agency." For purposes of this section, subsection (g) defines "agency" as:

(1) an Executive agency;
(2) the Government Printing Office;
(3) the Library of Congress;
(4) the Office of the Architect of the Capitol; and
(5) the Botanic Garden.

Accordingly, section 5584 of title 5, United States Code, has no application to the judicial branch of government.

Further, the Federal Claims Collection Act, 31 U.S.C. § 3701, does not apply to the judicial branch of government. An officer of the federal government is without power to release or otherwise dispose of the government's rights and property except to the extent that such power has been delegated to him by Congress or may be implied from other powers with which he is invested. Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941); 77 Am. Jur. 2d United States § 75 (1975). The enactment by Congress of four independent laws for the waiver and compromise of claims is compelling authority for the proposition that similar authority cannot be inferred for the Director in the absence of express statutory provision.

While initially the judiciary considered the possibility that erroneous payments of pay could be remedied by retroactive adjustment, at least in respect of those officers and employees whose rates of pay are determined and fixed by the Director, that approach must be abandoned in light of the numerous decisions of the Comptroller General holding that an administrative change in salary may not be made effective retroactively in the absence of express statutory authority. 26 Comp. Gen. 706 (1947), 39 Comp. Gen. 583 (1960), 40 Comp. Gen. 207 (1960), B-168715 (January 22, 1970). This rule is subject to exception only when an error occurred because of failure to carry out nondiscretionary administrative regulations or policies, or where administrative error has deprived the employee of a right granted by statute or regulation. See 34 Comp. Gen. 360 (1955), 39 Comp. Gen. 550 (1960), 21 Comp. Gen. 369, 376 (1941), 27 Comp. Gen. 300 (1947), 37 Comp. Gen. 754 (1958).

In September 1982, the Judicial Conference proposed this amendment to statutorily permit the Director of the Administrative Office to waive claims of overpayment against judicial officers and employees and provide a uniform authority for the waiver of collection of erroneous payments of pay and allowances for employees of all three branches of government by extending this limited authority to the judicial branch.

Section 616. Appeals under Title 9, United States Code.

In September 1986, the Judicial Conference approved support of an American Bar Association proposal to amend the United States Arbitration Act (9 U.S.C. § 1 et. seq) to add a provision dealing with appeal from judicial orders relating to arbitration (Conf. Rept., pp. 59-60). Section 616 sets forth this proposal.

Subsection (a) of the proposal, in effect, permits an appeal where the effect of the court order favors litigation over arbitration -- e.g., refusal to stay judicial action on issue referable to arbitration, denial of an application to compel arbitration, et. seq — or where a final decision with respect to arbitration is involved. Subsection (b), on the other hand, would not permit an appeal in specified instances in which an interlocutory judicial order favored arbitration over litigation — e.g., granting a stay of the judicial action, compelling arbitration, or refusing to enjoin an arbitration.

In deciding to support the ABA recommendation as a "sensible approach", the Judicial Conference noted that the proposal would amend the Arbitration Act (1) to clarify the appeals doctrine in this area, which is confused and irrational, and (2) to respond to the needs of arbitration as a system of dispute resolution by generally denying immediate appeals from orders giving arbitration precedence over litigation and permitting immediate appeals from orders giving litigation precedence over arbitration.

Under present doctrine, appeal from orders with respect to arbitration depends not only on the final judgment rule, but also on antique distinctions arising from the days when law and equity were administered by separate courts. The appealability of orders that direct arbitration, stay arbitration, or stay judicial proceedings depends on accidents of procedure that do not respond to any rational needs of either appeals timing or arbitration. The rules as to appealability, moreover, often are obscure. Courts have struggled with those matters for so long that legislative relief would be welcome.

In addition, as noted by the Conference, the appeals rules recommended are designed to enhance the value of arbitration as a means of nonjudicial dispute resolution. Arbitration is highly regarded for its speed, relative cheapness, privacy, and application of expert knowledge to specialized areas. These values are protected by permitting arbitration to proceed without appeal if the district court orders that arbitration precede litigation, and by permitting immediate appeal if the district court orders that litigation precede arbitration. Denial of appeal when arbitration is given precedence should not often be costly: district courts usually will be correct, and the arbitration process is apt to produce considerable savings in the process of preparing for trial if the dispute is ultimately found nonarbitrable. If the dispute is found to be arbitrable, of course, great savings will be made.

Moreover, under the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from final judgments, including a final judgment in an action to compel arbitration, a final judgment that refuses to enjoin arbitration, or a final judgment dismissing an action in deference to arbitration. These appeals preserve the general policy that appeal should be available where there is nothing left to be done in the district court. Orders of any type can be appealed under 28 U.S.C. § 1292(b), preserving the opportunity for immediate review whenever the district court and court of appeals concur that this course is desirable.

Section 617. Administrative Office Senior Position Amendments.

Section 617 amends section 603 of title 28, United States Code, to provide (1) that the salary of the Deputy Director of the Administrative Office shall be the same as the annual rate of basic pay for positions in level IV of the Executive Schedule, rather than level V, and (2) that the Director of the Administrative Office may establish up to six positions to be paid at the annual rate of basic pay for positions in level V of the Executive Schedule. This proposal would have permitted the Director to elevate six positions in the Administrative Office from the top of the General Schedule (GS-18) to the entry level of the Executive Schedule (level V). An effect of these changes would have been the freeing of six supergrade positions currently authorized for the Administrative Office to facilitate planned organizational changes deemed desirable to serve the Federal Judiciary into the next decade.

During the consideration of H. J. Res. 395, the final continuing resolution last session, the Senate adopted an amendment proposed by Senator Heflin to authorize the Director to set the salaries of the Deputy Director and six additional positions to be fixed at rates "not to exceed" the annual rate of basic pay for positions at level IV of the Executive Schedule. The conference committee ultimately reduced the number of enhanced positions from six to three.

The Judicial Conference continues to press for upgrading the salary level for all six positions as originally approved by the Senate. The proposed number of six was not a figure pulled out of the air or artificially inflated. It was a carefully chosen reflection of the actual number of equivalent senior positions in the agency then deemed of equal importance in terms of attracting and retaining outstanding professional talent. This change can be accomplished by striking subsection (a) of section 617 of S. 1482 and inserting in lieu thereof the following:

> (a) Amendment relating to 28 U.S.C. § 603. — Section 603 of title 28, United States Code, is amended by striking "three" in the second sentence and inserting in lieu thereof "six".

The cost of these changes is modest. The GS-18 salary is currently capped at $72,500, the same rate for positions at level V of the Executive Schedule. The most that the Director could increase the salary for these three positions would be from $72,500 to $77,500 — for a total of no more than $15,000. Utilization of the freed supergrades also would involve only modest cost. Assuming that these three persons moving from GS-15 to GS-16 are at step 5, the increase would be from $62,227 per year to $66,544, a total of $12,951 per year in increased costs.

The primary reason for this proposal is to enhance the ability of the Administrative Office to recruit and hold qualified persons, particularly persons with experience in the court system. Moreover, these same considerations bear on effective recruitment from the cadre of persons serving in the Executive Branch of government at the lower levels of the Executive Schedule or in the Senior Executive Service, the compensation of which ranges up to Executive Level IV.

The Judicial Conference is equally concerned about being able to recruit and retain top professional ability in another Senior Executive position — the Circuit Executive. Of consequence, there is a perception in fact that the current salary for this position is not competitive. In the last 13 months five of the twelve circuit executives have left the position; two retired, 3 accepted positions with reportedly substantial increases in salary. Accordingly, in September 1987, upon the unanimous recommendation of the Circuit Chief Judges, the Conference voted to recommend that salaries of Circuit Executives be increased to a rate not to exceed the annual rate of Level IV of the Executive Schedule pay rates. See Conf. Rept., P. 61. The Circuit Executive is the senior administrative official for the Judicial Cirucit in which appointed. As Secretary of the Judicial Council of the Circuit, this individual is responsible for a broad spectrum of duties in areas encompassing the selection of bankruptcy judges, judicial discipline, case and jury management, budget and financial control, space and facilities, procurement and property management, personnel, court security, telecommunications and automation, as well as other duties that may be delegated by the Council. As recognized by the Circuit Chief Judges in their recommendation for a salary increase for Circuit Executives, these circuit wide management responsibilities of Circuit Executives have increased dramatically since the creation of the position in 1972. In addition, the Circuit Executives continue to perform their traditional responsibilities involving supervision and administrative control of all non-judicial activities of the Courts of Appeals. It is imperative that the pay scale for these positions recognize the increased responsibilities of Circuit Executives and be competitive. Again, the cost is modest. For all twelve positions, the cost would amount to only $60,000 per year. This change can be accomplished by adding a new subsection (b) to section 617 of S. 1482 to amend the second paragraph of section 332(f) of title 28, United States Code, by striking "Level V" and insert in lieu thereof "Level IV", and redesignating current subsection (b) as subsection (c).

It is also worth noting that the new Trustee Program in the Department of Justice provides that all United States Trustees shall be paid up to level IV. The Attorney General is also authorized to pay United States attorneys at level IV. The ten assistant attorneys general in the Department of Justice are level IV positions.

In summary, for modest cost the judicial branch and the Administrative Office could significantly enhance their competitive situation with respect to recruitment for and retention in the most sensitive administrative positions by the changes recommended in this section.

Section 618. Court Security.

This provision clarifies the authority of the Administrative Office to expend appropriated funds for judicial security. While we believe that 28 U.S.C. § 604(a)(10)(C) is broad enough to provide such authority, explicit authorization of this important program is very desirable. Under this authorization, security services currently provided from the appropriation of the judiciary would be specifically authorized, as would the use of the Marshals Service on a non-reimbursable basis for personal judicial security.

Section 619. Travel Reimbursement.

Section 619 of the bill would amend 28 U.S.C. § 604(a)(7) with respect to the Director's authority to regulate and pay travel expenses of judicial officers and employees on official business. The Director presently discharges this function under two divergent authorities. With respect to judges appointed for life under Article III of the Constitution, along with the 16 judges of the United States Claims Court, and the four judges of territorial courts of the United States, section 456 of title 28 empowers the Director to pay subsistence expenses at rates fixed by him after considering but without limitation by the subsistence rates for Executive Branch personnel under 5 U.S.C. § 5702. The Director's authority to regulate the travel expenses of other judicial officers and employees derives from chapter 57 of title 5 (5 U.S.C. § 5705(a)), thereby limiting the subsistence expenses of this latter category to those approved for the Executive Branch by regulation of the Administrator of General Services under section 5702.

This more restricted travel expense provision with respect to Judicial Officers and employees other than Presidentially appointed judges has presented a problem only in two major instances — attendance at the annual circuit judicial conferences mandated by 28 U.S.C. § 333 and at meetings of committees of the Judicial Conference. The circuit conferences and Judicial Conference committees are, of course, composed primarily of Article III judges but include a representation of bankruptcy judges and magistrates and are also necessarily attended by certain staff of the Administrative Office and the courts concerned. These meetings are sometimes held at locations throughout the United States where distinct locality per diem rates have not been established by the GSA Administrator (as authorized by 5 U.S.C. § 5702(a)(2)) because they are in relatively rural areas rather than highly populous or metropolitan counties. In the absence of such a locality rate, these travelers would be limited to the nationwide per diem rate of $60 in daily reimbursement for subsistence expenses, or to $90 (150 percent of the per diem rate) in itemized actual expenses of subsistence. Judges under the same circumstances would have the additional option, under their travel regulations pursuant to the authority of section 456, to claim up to $150 per day in itemized actual expenses of subsistence.

The Conference concluded that it is simply unfair that there be two tiers of reimbursement for subsistence expenses necessarily incurred in official travel under these circumstances. This unfairness is aggravated by the fact that the bankruptcy judges, magistrates, and judicial employees do not have a voice in the selection of sites for circuit conferences or Conference committee meetings, and their attendance at these events is not voluntary. They should equitably not be forced to pay their daily subsistence expenses out of their own pockets where they are required to stay in the same quarters with their Article III counterparts in the interest of efficient conduct of the conference or meeting.

This problem may be alleviated by the amendment that section 619 would effect, permitting the Director to fix reimbursement rates for the subsistence expenses of all judicial officers and employees not to exceed those for Article III judges under 28 U.S.C. § 456 in circumstances where these two echelons of travelers are obligated to attend meeting or conferences simultaneously at the same facility.

Section 620. Reports and Statistics.

This section alters two reporting requirements now assigned to the Administrative Office by statute.

The first report is that required by 12 U.S.C. § 3421(a), the Right to Financial Privacy Act of 1978. The 1985 report described only 33 events under the Act. Much the same information is reported by administrative agencies under 12 U.S.C. § 3421(b). The section is repealed after the 1989 report. This would be the tenth annual report.

The second report involves requests for awards of fees and expenses under the Equal Access to Justice Act. These reports have been filed for seven years and require significant resources to produce. The Justice Department is the most efficient source of this data, and the section transfers the reporting requirement to that agency.

Section 621. District of Columbia Public Defender Amendments.

This section would transfer the responsibility for fiscal operations of the District of Columbia Public Defender Service from the Administrative Office of the United States Courts to the Board of Trustees of the Service. The Service is a District of Columbia Government agency, and the section would transfer these duties from the Federal Government to the District of Columbia Government.

Section 622. Claims Court Fees.

Section 622 amends 28 U.S.C. § 2520 to raise the filing fee in the United States Claims Court from an amount not to exceed $60 to an amount not to exceed $120. This brings the Claims Court fee into line with the filing fee in the United States district courts, as increased by Public Law No. 99-500, the Judiciary's Appropriation Act for the Fiscal Year 1987. The increased fee in the Claims Court would be imposed 30 days after the date of enactment.

Section 623. Temporary Emergency Court of Appeals.

The Judicial Conference supports phasing out the Temporary Emergency Court of Appeals and recommends designation of the Court of Appeals for the Federal Circuit as the forum for appellate review of future TECA cases.

The Temporary Emergency Court of Appeals was created in 1970 with jurisdiction over appeals involving wage-price regulations. While its original assignment has faded away, over the years it has been given new but somewhat related jurisdiction, now largely involving rate setting in the oil and gas industry.

In creating the court and in giving it new jurisdiction, Congress appears to have had two objectives in mind. First, the cases assigned to it were cases in which the need for a uniform body of law was paramount. Second, the cases to be heard by the court were cases that ought to be rapidly concluded.

There are currently only two dozen cases on the court's docket and somewhat over 350 cases in the district courts with the potential for reaching the court. The main statutory authority for filing such cases expires this year. On the average, one civil appeal is ultimately taken for every 12 civil cases filed. If this ratio holds true in these cases, only 30 more appeals will be taken.

The court's direct budget for its four employees is $144,000. Indirect costs include borrowed space, office equipment and judges' travel. The total cost is probably in the neighborhood of $200,000 per year.

Under normal staffing patterns for appellate courts, one position is authorized for every 75 appeals. Thus, TECA's caseload would require, at most, one employee in a normal court setting.

Senators DeConcini, Hatch and Grassley have introduced legislation proposing TECA abolition, and the Judicial Conference approved the concept at its March 1987 meeting (Conf. Rept., p. 20). A poll of TECA's 24 judges found only one who supported retaining the court.

The DeConcini bill proposes the Federal Circuit as the situs for future TECA appeals, and the Judicial Conference supports this proposal. The Federal Circuit with its experience in complex cases involving specialized subject matter, its relatively light caseload, its prompt disposition record, and its small group of judges in close proximity to each other would seem to be highly suitable to continue TECA's objectives of providing a uniform body of law in a prompt manner.

Section 624. Judicial Cost-of-Living Increases.

Section 624 would repeal section 140 of Public Law No. 97-92, 95 Stat. 1183, 1200, which bars annual cost-of-living adjustments in pay for federal judges except as specifically authorized by Congress. Thus, it would restore the operation of 28 U.S.C. § 461 as to Article III judges, as enacted by the Federal Salary Cost-of-Living Adjustment Act of 1975.

C. JUDICIAL CONFERENCE RECOMMENDATIONS ADOPTED AFTER S. 1482 WAS INTRODUCED.

I. Corporate Venue.

The Conference recommends that 28 U.S.C. § 1391(c) be amended to read as follows:

> For purposes of venue under this chapter, a corporate defendant shall be deemed to reside in any judicial district in which it is subject to personal

jurisdiction at the time the action is commenced. In a state having more than one judicial district, a corporation shall be deemed to reside in any district within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate state, and if there is no such district the corporation shall be deemed to reside in the district within which it has the most significant contacts.

Venue generally turns on one of two considerations: the place where the claim arose or the residence of the parties. When one or more of the parties is a corporation, venue problems arise in determining a corporation's "residence." The general venue statute defines the residence of a corporation as "any judicial district in which it is incorporated or licensed to do business or is doing business". 28 U.S.C. § 1391(c). Read literally, the statute appears to make venue proper in any district in a multidistrict state in which a corporation is incorporated, licensed to do business, or doing business.

The Conference believes that a corporation for venue purposes should be deemed to reside in any judicial district in which it was subject to personal jurisdiction at the time the action was commenced. In multidistrict states in which a corporation is not incorporated or licensed to do business, the venue determination should be made with reference to the particular district in which a corporation is sued. Thus, for example, a corporation that confines its activities to Los Angeles (Central California) should not be required to defend in San Francisco (Northern California) unless, of course, venue lies there for other reasons. The Conference therefore recommends that 28 U.S.C. § 1391(c) be amended as indicated above to accomplish this purpose.

II. Removal Jurisdiction.

In studying problems relating to removal jurisdiction, the Judicial Conference has concluded that amendments to 28 U.S.C. §§ 1441(a), 1446 and 1447 are warranted.

All of these proposed amendments relate to removal jurisdiction and are set forth and explained fully at Appendix F. The amendments would, among other things, permit removal by "any" defendant; allow the citizenship of fictitious or "Doe" defendants to be disregarded for removal purposes; simplify the "pleading" requirements for removal; establish a one-year limit on removal based on diversity jurisdiction; eliminate the bond requirement on removal procedure; and regulate the joinder of additional parties after removal.

III. Interlocutory orders staying or otherwise regulating the court's own proceedings.

At its meeting on September 21-22, 1987, the Judicial Conference approved an amendment to 28 U.S.C. § 1292(a)(1) that would bar appeals from interlocutory orders of the district courts with respect to staying or otherwise regulating the court's own proceedings. In so doing, the Conference is recommending overruling the so-called Enelow-Ettelson doctrine (Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935); Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942)). Under that doctrine an order that governs the course of a court's own proceedings or stays the court's own proceedings is appealable if the underlying action is one that would have been brought at law before the merger of law and equity, and the basis of the order is some matter that could have been raised in a suit in equity before merger. The doctrine has been universally criticized. In the first place, there is no reason to distinguish between actions at law and suits in equity in determining whether a matter such as a stay of proceedings should be appealable. Furthermore, many actions involve requests both for legal and for equitable relief, or otherwise arise in postures that make such an historic analogy impossible.

Under this amendment, orders restraining proceedings before other tribunals would still be treated as injunction orders under section 1292(a)(1) and would be appealable in most circumstances. Moreover, the Conference's recommendation contemplates that each judge be considered a "court" within the meaning of this language; should one judge of a district court enjoin parties from proceeding before another judge of the same court, for instance, the order would be an injunction and appealable as such.

This proposal can be accomplished by amending 28 U.S.C. § 1292(a)(1) by deleting the semicolon at the end of the paragraph and inserting in lieu thereof ", and except that orders with respect to staying or otherwise regulating the court's own proceedings are not appealable under this subsection;". It should also be pointed out that technical amendments need to be made to this paragraph deleting the reference to the United States District Court for the District of the Canal Zone and adding a reference to the District Court of the Northern Mariana Islands.

IV. Financial Disclosure Reports by Court Reporters.

At its September 1987 meeting, the Judicial Conference adopted a recommendation that legislation be sought specifically to relieve court reporters from any requirement to file financial disclosure reports. Conf. Rept., p. 78. The current requirement for the filing of a financial disclosure report by official United States court reporters arises from a literal reading of the definition of "judicial employee" in section 308(10) of the Ethics in Government Act (Public Law 95-521; 28 U.S.C. App. II, 308(10)). See Conf. Rept. 1981, pp. 78-79. Under this reading, gross receipts from the sale of official transcripts by the reporter are added to regular salary to reach the financial disclosure triggering amount of compensation (at or above the minimum rate for GS-16).

After a number of years of experience with the reporting requirement, the Judicial Conference concluded that court reporters should be excluded. In the first instance, the requirement generated considerable confusion among court reporters which required an unnecessary volume of correspondence by the Judicial Ethics Committee. And secondly, the Conference was unable to identify any potential conflict of interest stemming from reporters' official duties which would require the need for such financial disclosure.

The change proposed can be accomplished by amending section 301(h) of the Ethics in Government Act of 1978, as amended, by inserting after "shall not apply to" the language "court reporters, or".

V. Method of Court Recording.

Under current 28 U.S.C. § 636(c)(7) the litigants are allowed to impose upon the court the method by which the court record will be taken before a magistrate. The Judicial Conference recommends that this provision applicable to magistrates be amended to parallel provisions applicable to judges that reserve to the judge to determine the method for recording the court's proceedings. It is simply bad policy to permit a party to force a magistrate to use, for example, shorthand reporting when he or she might wish to use another method in order to manage the court business more expeditiously. This change can be made by amending 28 U.S.C. § 636(c)(7) to read as follows:

> (7) The magistrate shall determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means subject to the guidelines of the Judicial Conference.

VI. Location of Chambers of Circuit Judges.

The Judicial Conference at its March 1988 meeting reviewed problems related to the location of chambers of circuit judges and concluded that 28 U.S.C. § 462(c) relating to court accommodations should be modified to provide more flexibility in this regard. The proposed amendment would permit chambers for circuit judges to be provided by the Director at any place where the judicial council of the circuit approves.

Current law provides that the Director, with judicial council approval, may provide chambers for circuit judges only at statutorily designated places of holding court or elsewhere in existing Federal facilities. When a circuit judge resides and wishes office space in a community with no Federal facilities or with Federal facilities filled to capacity, the Judiciary has been forced to go to Congress to seek specific legislation to statutorily designate such a community as a place of holding district court so that private leased space may be procured. This practice has the potential of defeating both congressional and Judicial Conference policy against the proliferation of places of holding court. In addition, when a place is statutorily designated as a place of holding court, the Judiciary is inevitably faced with community and congressional pressure to actually hold court there or to build another Federal courthouse, a problem which the Judiciary has already faced several times.

In amending what is now section 462 (formerly section 142) of title 28, United States Code, to permit the use of Federal facilities by circuit judges in places other than where court is held, Congress in 1977 stated that its purpose was to "deter the proliferation of places of holding court . . . and alleviate an inconvenience for circuit court judges which Congress never intended to impose upon them . . .". S. Rept. No. 95-589, 95th Cong., 1st Sess. (1977). This amendment does not appear to contravene, and indeed is consistent with, the purposes of the original legislation, which evidently contemplated localized "resident chambers" for circuit judges convenient to their communities of residence.

The following amendment would achieve the result suggested:

SEC. . (a) Section 462(c) of title 28, United States Code, is amended by striking "where Federal facilities are available" and inserting in lieu thereof "other than where regular sessions of court are authorized by law to be held,".

(b) This section shall take effect upon the date of enactment.

VII. Board of Certification for Circuit Executives.

In its March 1988 meeting, the Judicial Conference voted to recommend to Congress that 28 U.S.C. § 332 be amended to eliminate the circuit executive board of certification procedure currently utilized for the selection of circuit executives and to place its personnel evaluation functions in the judicial councils of each circuit. The Board was established in 1971 as part of the Circuit Executive Act (Public Law 91-647) and, as a national personnel evaluation board, accorded responsibility to ensure that the Judiciary would be provided with trained professional managers who could offer staff support to judicial councils and administrative support to chief judges. The Board played a vital role in the early years in the evolution of the court executive position, setting standards for qualification and initially screening the many applicants.

After careful review, the Conference has concluded that the concept of court executive has matured and ripened in the 17 years of the Board's existence to such an extent that the Board is no longer needed to structure and manage the selection of these court officers. Indeed both the number of and demand for outstanding trained managers available to the courts has increased dramatically. As a result, the focus has shifted sharply away from development of the concept of "court administrator" and training for such positions to recruiting activities. The Conference concluded that the judicial councils and courts can now most effectively recruit and select court executives at the local level. Accordingly, the proposal would eliminate the centralized board of certification and place the responsibility for recruiting on the circuit judicial councils, using the same statutory selection criteria now applicable to the certification procedure. This result can be accomplished by amending section 332 of title 28, United States Code, (1) in subsection (e) by striking "executive from among persons who shall be certified by the Board of Certification" and inserting in lieu thereof "executive. In appointing a circuit executive, the judicial council shall take into account experience in administrative and executive positions, familiarity with court procedures, and special training."; and (2) in subsection (f) by striking the first paragraph and redesignating the remaining paragraphs as (1), (2), (3), and (4), respectively. The amendments should take effect on the date of enactment.

VIII. Federal Jurisdiction Reform.

The Judicial Conference has long taken a strong interest in Federal jurisdiction issues. Until recently, this interest was reflected in the Subcommittees on Federal Jurisdiction and on Federal-State Relations of the Committee on Court Administration. As part of a general reorganization last

September, the Conference elevated this subject to full committee status by creating the Committee on Federal-State Jurisdiction. In light of this long interest and the fact that some jurisdiction reform issues are being addressed in omnibus judicial improvements legislation by the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice in H.R. 3152, we thought it might be helpful to share with this Subcommittee at this time some of the ideas that are circulating on the main topic of Federal diversity jurisdiction.

a. Total Elimination of Diversity Jurisdiction.

Probably the most important extant Judicial Conference policy on jurisdiction is its proposal, except in the limited instance noted below adopted in its meeting this month relating to a single-event mass disaster, to eliminate Federal jurisdiction over suits grounded solely on the basis that the parties are citizens of different states. Conf. Rept., 1977, pp. 8-9. These are civil suits that do not involve any issue of Federal law but only issues of State or local law. They are in the Federal courts for no reason other than that the litigants happen to be from different States. As recently as March 1986, the Conference reaffirmed its basic request that Congress eliminate diversity jurisdiction. Conf. Rept., p. 17. The stakes are huge, indeed. There is literally a flood of such cases coming into the Federal courts. In the last decade, diversity cases have more than doubled — from 31,625 in 1978 to over 65,000 in 1987. According to a Federal Judicial Center in-house study in 1987, the estimated cost attributable to the entire diversity jurisdiction was some $126,350,173, or almost 10 percent of th total budget for the Judicial Branch. A copy of the Federal Judicial Center study by Anthony Partridge is being submitted for the record. It should be noted that the Judicial Conference position is also supported by the United States Department of Justice and the Conference of Chief Justices.

While S. 1482 does not contain language to implement this recommendation, the Conference has submitted separate legislation to the Congress. A copy of the proposal and the accompanying letter of transmittal are attached as Appendix G.

b. Measures to Limit Diversity Short of Total Elimination.

While the Judicial Conference has strongly supported total elimination of diversity cases in the Federal courts, the Conference has also repeatedly endorsed measures short of total elimination, so long as its primary position is made clear. There have been other proposals to limit diversity jurisdiction that the Judicial Conference has not considered but are consistent with the general predisposition of the Conference to favor narrowing ideas. For example, the Conference's formal endorsement, along with the Conference of Chief Justices and the American Bar Association, of increasing the jurisdictional amount from $10,000 to $50,000 does not suggest objection to an increase to $100,000, since the latter figure moves the statutory policy on diversity closer to the ultimate goal of total elimination.

1. Eliminate In-State Plaintiff Diversity Jurisdiction. In March 1977, the Conference supported legislation to prohibit a plaintiff from filing a diversity case in the State of his own residence. Conf. Rept., pp. 8-9. In the Federal Judicial

Center study noted above, the cost estimate of the effect of this change was placed at over $42 million.

2. Amount in Controversy. In September 1987, the Conference endorsed raising the amount-in-controversy in diversity cases to $50,000. Conf. Rept., p. 72. It reaffirmed that position at its meeting this week. This parallels similar action by the Conference of Chief Justices and the American Bar Association. While the Conference has never considered it, some have suggested that the $50,000 should be limited to "actual out-of-pocket damages", so as to exclude speculative harm, such as pain and suffering, and punitive damages. As the argument goes, this would not only put a damper on alleging inflated jurisdictional amounts but also would facilitate early disposition of jurisdictional disputes on motion for summary judgment.

3. Representative Parties in Diversity Cases. In September 1985, the Conference endorsed legislation to provide that a legal representative of a deceased person, a minor, or an incompetent would be deemed to be a citizen only of the same State as the deceased, minor, or incompetent. Conf. Rept., p. 49. This issue is presented in section 603 of S. 1482 and is discussed herein at the appropriate place for that section.

4. Corporate Citizenship. Section 412 of H.R. 3152 would amend 28 U.S.C. § 1332(c) to enlarge the definition of corporate citizenship to include "any State in which it does business." This proposal was considered by the Judicial Conference at its meeting this week. The Conference concluded that, although this constituted a significant step to limit diversity jurisdiction, applying a "doing business" standard to determine subject matter jurisdiction would interject complexity and uncertainty into this important area. The Conference, therefore, endorsed an objective standard suggested by the Department of Justice to provide that a corporation shall be deemed a citizen of any State in which it is licensed or registered to do business. This objective standard would still substantially reduce the extent of diversity litigation involving corporations.

5. Prior Significant Residence. At least one source has suggested that a plaintiff should not be able to bring a diversity case in the Federal court if the plaintiff has been a resident of the same State as a defendant under specified time conditions, such as for two of the last five years.

6. Resident Aliens. Under 28 U.S.C. § 1332(a)(2), an alien domiciled in a State of the United States is entitled to assert diversity jurisdiction in an action between that alien and a resident of the same State. There have been suggestions that this situation should be changed so that an alien domiciled in a State would be deemed a citizen of that State for the purposes of diversity jurisdiction. The Judicial Conference has not taken a position on this proposal.

7. Filing Fees. Some have suggested that filing fees should be substantially increased for diversity cases.

c. Modest Expansion of Diversity concepts to Accommodate Single-Event Mass Disaster Torts.

At the request of Congressman Kastenmeier, the Judicial Conference in its meeting this week reviewed the multi-party, multi-forum jurisdiction concept in Title IV of subtitle A of H.R. 3152.

The bill as drafted would provide for Federal jurisdiction in "civil actions arising out of the same transaction, occurrence, or series of related transactions or occurrences," if any party is a citizen of a different State than any adverse party (minimal diversity), and if two or more defendants reside in different states or substantial acts occurred in different States. § 1367(a). These requirements would serve the purpose of defining situations with a potential for scattered litigation. The jurisdiction could be invoked under the bill only if the action involves claims for injury to persons or property and (1) 25 persons have suffered damages of at least $50,000 each, or (2) 5 persons have suffered damages of at least $10,000 each and either a plaintiff shows that he cannot join all proper defendants in a State court, or a defendant shows actual multiple litigation in different courts. This is a somewhat oversimplified statement of the essence of the jurisdictional proposal. These provisions are built on the principle that Article III authorizes Congress to vest diversity jurisdiction even where there is less than complete diversity among the parties.

The Conference approved in principle creation of Federal jurisdiction that would rely on minimal diversity to consolidate multiple litigation in State and Federal courts of cases involving personal injury or property damage, provided it is limited to injury or damage arising out of a single event. Support for such an enhancement of current diversity jurisdiction is contingent upon acceptance of provisions that would otherwise narrow diversity jurisdiction. In essence, the Conference concluded that, if narrowed to reach only single event occurrences, H.R. 3152 sets forth a reasonable approach to dealing with problems associated with mass disasters by providing a means to consolidate multiple personal injury and property damage cases that would otherwise be scattered in various State and Federal courts into a single forum.

The Conference believes that, as modified, this concept deserves support for the following reasons:

First, As the Conference's repeated calls for the abolition of diversity jurisdiction indicate, there is substantial sentiment that diversity jurisdiction in its present form serves little useful purpose. It is primarily used as a tactical device by the bar, and it results in devoting scarce Federal judicial resources to litigation that could be resolved as well in State courts. H.R. 3152, by contrast, would redirect diversity jurisdiction to serve a purpose that State courts are not able to serve, i.e., to facilitate the consolidation of scattered actions arising out of the same occurrence and thereby promote more expeditious and economical disposition of such litigation. Thus, its function would be analogous to that of the Federal Interpleader Act.

Second, if coupled with suggestions to narrow diversity jurisdiction, the adoption of H.R. 3152 would probably not increase the burdens on the Federal courts. Two provisions in subtitle B of Title IV (Diversity Reform) of H.R. 3152 would narrow diversity jurisdiction. Other recommendations have been made. Adoption of some of these proposals should reduce the volume of diversity jurisdiction. In addition, while it is impossible to predict how many new cases would be brought into the Federal courts under this proposal, the Conference believes that, if limited to single-event cases (which would exclude, e.g., asbestos, drug, and similar product cases), it will not result in a substantial additional load. Claims arising out of mass torts now are frequently brought in the Federal courts under existing jurisdiction; the additional cases brought into the courts through consolidation probably would not add greatly to existing burdens. The bill also is limited to personal injury and property damage cases; thus it excludes, for example, claims arising out of commercial or securities transactions. Finally, the impact of the proposal will be lessened because it provides that the Federal district court shall remand proceedings for determination of damages after liability is adjudicated, unless it finds that the interests of justice require that it retain the action. §§ 1407(i), 1441(f)(2).

The Committee print draft of the House Report on H.R. 3152 concludes that "there would be little or no net increase in the workload of the Federal courts," and the Conference has no reason to doubt the accuracy of that statement, provided that the present text of the bill is revised as recommended.

Because of the provision for remanding trial of damages issues to the court in which an action was first filed, the bill should also be amended to provide for intermediate appeal on liability issues. Appeals should be taken to the circuit in which the liability issues were tried, and should be taken before remand for determination of damages issues.

It should be noted that the Department of Justice agrees with the Judicial Conference position on this subject.

Revised draft
March 5, 1987

BUDGET SAVINGS THAT WOULD BE ACHIEVED THROUGH CHANGES IN FEDERAL COURT JURISDICTION

I. Introduction

In estimating the savings that would result from possible changes in the jurisdictional statutes, we have taken a long-term view. We have asked what costs are attributable to cases that would no longer be within the jurisdiction if a proposal to restrict the jurisdiction were adopted. We have assumed that, over time, the resources attributable to these cases would be either put to other use or eliminated.

For a number of reasons, the estimated savings would not all be available in the short term. First, cases filed before the enactment of the jurisdictional legislation would presumably remain in the federal courts. Second, judges with life tenure are entitled to continue in office even if the number of authorized judgeships is reduced. Third, if reductions in supporting staff are achieved through attrition, there may be delay involved; if not, there may be other costs. Fourth, if space were rendered surplus to the needs of the judiciary, it would take time before other uses were found for it.

To the extent that jurisdictional changes would eliminate the need for growth that would otherwise occur in the size of the judicial establishment (as contrasted with producing a shrinkage), the savings would be realized relatively quickly. Moreover, the short-term savings would include savings of some nonrecurring costs that are associated with growth--such as the initial construction and furnishing of a judge's chambers. These nonrecurring costs are not included in our estimates. The Administrative Office has recently estimated the nonrecurring costs at about $600,000 for a district judgeship and $325,000 for a circuit judgeship.

We also note the possibility that some of the projected savings might not be realized even in the long run. As is noted in appendix A, courts often do not request additional judgeships even when they have caseloads that would justify them under the standards used by the Judicial Conference (and generally accepted by the Congress) for recommending additional judgeships. If a jurisdictional change operated only to prevent caseload growth, these courts would presumably continue to operate as they have in the past. If the caseloads of such courts shrank as a result of a jurisdictional change, however, a possible result is a reduction in the average caseload per judge in such courts rather than a reduction in the number of judgeships. If diversity-of-citizenship jurisdiction were eliminated entirely, there were no growth in other cases, and every court adhered to the Judicial Conference standard of 400 weighted filings per judgeship, we have calculated that only about three-quarters of our estimated savings in district judgeships would be realized. As will be seen, such a saving would still be very substantial.

The estimates are based on the assumption that, in the absence of jurisdictional changes, the courts will be fully staffed. Hence, estimates of judgeships that can be saved should be considered in the context of the 631 district judgeships and 169 court of appeals judgeships (excluding the Federal Circuit) that would be authorized if pending Judicial Conference recommendations were adopted, rather than the 575 and 156 such judgeships now authorized. Estimates of support personnel that can be saved should be considered in the context of full staffing according to accepted formulas, rather than the 94 percent of full staffing that has been imposed as a consequence Gramm-Rudman-Hollings.

All the estimates assume stability in patterns of case filings. We have not attempted to forecast caseloads for future years because we know of no reliable technique for doing so on a long-range basis. Nor, in developing cost estimates, have we tried to anticipate inflation.

Finally, it will be observed that the estimates do not take account of potential savings in the compensation of retired judges and logistical support of those who remain as senior judges. Over the long term, of course, the size of the corps of retired judges is closely related to the number of authorized judgeships, but the long term is in this instance very long. Estimating the impact of changes in jurisdiction on the number of retired judges is difficult both because relevant data are not readily available and because the number of such judges is also related to the average age of judges at the time of appointment, a figure that changes from time to time.

II. Elimination or Restriction of Diversity Jurisdiction

A. Total Elimination of Diversity Jurisdiction

At its March 1977 session, the Judicial Conference of the United States endorsed a bill, H.R. 761 (95th Cong., 1st Sess.), that would have repealed both 28 U.S.C. § 1332 (the general diversity statute) and § 1335 (the interpleader act). (Conf. Rept, pp. 8-9.) That position was treated as still valid in the report of the September 1985 Conference. (Conf. Rept, p. 49). The report of the March 1986 Conference, in a series of recommendations made in response to the Gramm-Rudman-Hollings legislation, recommended elimination of the diversity jurisdiction "under 28 U.S.C. 1332" (Conf. Rept, p. 17); if taken literally, this recommendation would leave jurisdiction under the interpleader statute untouched, but would eliminate all other diversity jurisdiction.

The estimated costs attributable to the entire diversity jurisdiction are as follows:

192	District judgeships	$ 85,209,600
28	Full-time magistrates	7,915,600
10%	Time of part-time magistrates	297,000
143,971	Juror days	6,838,623
471	District court deputy clerks	13,157,385
22	Court of appeals judgeships	10,085,130
51	Court of appeals deputy clerks	1,424,685
39	Administrative Office positions	1,333,800
135	fewer judges and 14 fewer magistrates attending FJC seminars	88,350
		$126,350,173

The methods by which the various kinds of resources have been attributed to the diversity jurisdiction are set forth in appendix A. For the most part, the attributions are supported by quite solid data. The notable exceptions are as follows:

1. We have been unable to take account of original proceedings in the courts of appeals, of which there were 703 in the 1986 statistical year. Some of them are presumably ancillary to diversity cases, but we have no basis for estimating the number. Not more than one or two judgeships are likely to be at stake.

2. The estimates of the magistrate activity devoted to diversity cases are quite soft. They could easily be off by as much as 50 percent.

3. The estimates of juror time may be subject to considerable error, but are unlikely to be off by more than 20 percent.

We also note that some cases now characterized as diversity cases might possibly come back under other jurisdictional grants, but we doubt that any effect could be substantial. Under current reporting rules, a case is characterized as a federal question case if both diversity and federal question jurisdiction are asserted.

The cost factors attributable to the various resources are set forth in appendix B. Most of them are highly reliable, reflecting actual experience. However, we have not been able to develop an estimate of space and facilities costs that would be associated with a reduction in the number of deputy clerks, and such costs are therefore not included.

B. H.R. 4314

In March 1986, Chairman Kastenmeier introduced two bills that would have limited the jurisdiction. The first of them, H.R. 4314 (99th Cong., 2d Sess.) would have made the following changes:

1. It would have repealed 28 U.S.C. § 1332(a)(1) ("citizens of different States") but retained the paragraphs of section 1332 that refer to aliens and foreign states. For the retained cases, it would have raised the jurisdictional amount under section 1332 to $50,000.

2. It would have amended the Federal Interpleader Act, 28 U.S.C. § 1335, to make applicable the definitions of corporate citizenship contained § 1332(c).

3. It would have expanded venue in nondiversity cases, now restricted to "the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law" (28 U.S.C. § 1391), to include the judicial district in which all plaintiffs reside.

There is no basis in existing data for estimating the number of cases that would remain within the federal jurisdiction by virtue of parties being aliens or foreign states.

Although there are no regularly collected data identifying cases filed under the interpleader act, a WESTLAW search of court of appeals opinions for the year ending June 30, 1986, suggests that the number of such cases is small. The opinions aren't uniformly clear about the jurisdictional basis, but at most there were fourteen opinions in cases brought as interpleader in which jurisdiction was based on diversity of citizenship--including both cases under the interpleader act and cases under the general diversity grant. (In a handful of additional cases, parties were added by an interpleader counterclaim.) This number compares with a figure of 870 diversity appeals terminated with published opinions during that period. (Unpublished Administrative Office data.) It is highly probable that a similarly small proportion of district court diversity cases are interpleader cases. Hence, we conclude that saving the jurisdiction in interpleader cases would not materially reduce the potential savings that would be realized by eliminating diversity jurisdiction.

The suggested liberalization of venue in nondiversity cases is outside the scope of this study. It is, of course, not possible to develop an estimate of the impact of such a change on the basis of data maintained about cases that are currently within the jurisdiction of the federal courts.

C. H.R. 4315

The other bill introduced by Congressman Kastenmeier, H.R. 4315 (99th Cong., 2d Sess.), would have raised the jurisdictional amount under section 1332 to $25,000 and added a new provision conferring jurisdiction and providing venue rules for certain cases arising out of mass torts.

Forecasting the impact of a change in the jurisdictional amount is a hazardous enterprise. We have based our estimate on the ad damnum in the complaint as reported to the Administrative Office, but we have a number of reservations about the validity of the estimates.

First, in many cases, the ad damnum is quite arbitrary. Since the bias of plaintiffs' lawyers is undoubtedly to choose a high figure, however, there are probably limited possibilities for evading a higher jurisdictional amount by raising the ad damnum.

Second, in cases in which both damages and equitable relief are sought, the ad damnum is not an appropriate measure of the value of the matter in controversy. A lawyer who asks for $20,000 in damages may legitimately assert that the amount in controversy exceeds $25,000. We have no way of knowing the frequency with which this occurs. To the extent that it does, we have tended to overestimate the impact of raising the jurisdictional amount.

Third, there is some reason to think that cases with a high ad damnum create more work, particularly for district judges, than cases with a low ad damnum. We have used weighted caseload to estimate the number of district judgeships attributable to cases valued at $25,000 or less. Since case weights are based on the nature of the suit without regard to the ad damnum, we may be overestimating the work saved.

Fourth, the ad damnum is an item that is not used in the Administrative Office's published statistics, and the accuracy of the reporting is not monitored as closely as the reporting of some other data. Several problem areas have been identified:

1. In 34.4 percent of the diversity cases filed in the year ended in June 1986, the size of the ad damnum was not reported to the Administrative Office. Some complaints may not include an ad damnum, particularly those in which only equitable relief is sought. Examination of the underlying data suggests, however, that there is serious underreporting by some districts. We have used the cases in which the ad damnum was reported as if they were a sample of all the cases, but that could introduce substantial error.

2. In more than ten percent of the cases in which the ad damnum was reported, it was reported (to the nearest thousand) as $10,000. We are inclined to view that figure with suspicion. We suspect that in most of these cases the jurisdictional allegation ("exceeds $10,000") was reported as the amount in controversy, and that the actual value of the matter in controversy was higher; if so, it would result in a tendency to overstate the amount that would be saved by raising the jurisdictional amount.

3. The reporting instructions require that the ad damnum be reported in thousands. An ad damnum of $10,000 would thus be reported as "10." It is known that there are some cases in which the reporting clerks fail to drop the zeroes. In such a case, we would read the $10,000 ad damnum as $10,000,000. To the extent that this kind of error has occurred, it would tend to produce an understatement of the amount to be saved by raising the jurisdictional amount.

Finally, our estimates of appeals and juror days are derived from statistical series that do not include information about the ad damnum. We have sought to solve this problem by matching two data sets and finding the same cases in both. Our match was successful with respect to only 84.4 percent of the diversity appeals and 93.3 percent of the diversity jury trials. We have had no choice but to assume that the cases we succeeded in matching constitute an unbiased sample of the whole group.

On balance, our estimates of savings seem more likely to be too high than too low, and the error may be substantial.

With that reservation, we have estimated the savings that would be achieved by raising the jurisdictional amount to $25,000 as follows:

47	District judgeships	$ 20,858,600
7	Full-time magistrates	1,978,900
2.46%	Time of part-time magistrates	73,062
34,315	Juror days	1,629,963
115	District court deputy clerks	3,212,525
5	Court of appeals judgeships	2,292,075
12	Court of appeals deputy clerks	335,220
10	Administrative Office positions	342,000
33	fewer judges and 4 fewer magistrates attending FJC seminars	21,900
		$ 30,744,245

For a jurisdictional amount of $50,000, our estimate is as follows:

68	District judgeships	$ 30,178,400
10	Full-time magistrates	2,827,000
3.61%	Time of part-time magistrates	107,217
43,382	Juror days	2,060,645
168	District court deputy clerks	4,693,080
7	Court of appeals judgeships	3,208,905
16	Court of appeals deputy clerks	446,960
14	Administrative Office positions	478,800
47	fewer judges and 5 fewer magistrates attending FJC seminars	30,825
		$ 44,031,832

For $100,000, it is as follows:

90	District judgeships	$ 39,942,000
14	Full-time magistrates	3,957,800
4.76%	Time of part-time magistrates	141,372
54,939	Juror days	2,609,603
221	District court deputy clerks	6,173,635
9	Court of appeals judgeships	4,125,735
20	Court of appeals deputy clerks	558,700
18	Administrative Office positions	615,600
63	fewer judges and 7 fewer magistrates attending FJC seminars	41,475
		$ 58,165,920

Once again, H.R. 4315's expansion of jurisdiction in mass tort cases is outside the scope of this study.

D. Restrictions on Venue

In the American Law Institute's study of the division of jurisdiction between state and federal courts, a number of provisions were suggested that would have barred litigants from suing in certain districts although allowing them to sue in other districts. (American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts (1969).) Although many of these provisions were characterized by the authors as jurisdictional, they dealt with subjects that have generally been treated as involving venue. The major proposals may be summarized as follows:

1. Diversity jurisdiction could not be invoked by a party in a district in the state of the party's citizenship. This rule, which is consistent with current law governing removal, would be applied to original actions as well. (As under current law, a corporation would be deemed a citizen of its state of incorporation and the state in which it maintained its principal place of business.) However, for purposes of removal, the proposal would also eliminate the complete diversity requirement, and permit a single defendant to remove the entire case.

2. Diversity jurisdiction could not be invoked, either originally or through removal, by an individual in a district in a state in which he or she had had a principal place of business or employment for more than two years.

3. Diversity jurisdiction could not be invoked by a corporation in a state in which it had maintained a local establishment for more than two years if the action arose out of the activities of that establishment.

4. Venue rules for diversity cases would eliminate the present provision providing venue in the district in which all plaintiffs reside, and corporate residence for venue purposes would be limited to the state of incorporation and the district of the principal place of business.

5. An expanded jurisdiction for multiparty cases would be created.

Available data that would permit us to simulate these changes are quite limited. However, we are able to estimate the impact of a change that would bar an individual plaintiff from invoking the jurisdiction in a court in the state of his or her citizenship. Our inability to include corporate litigants in our estimate is a very substantial limitation on its utility.

The Administrative Office reporting system calls for identification of the state of citizenship of only the principal plaintiff. Under the ALI proposal, it would appear that suit would be barred in the state of citizenship of any plaintiff; to that extent, we may have understated the effect of the bar. On the other hand, we have no way of estimating the extent to which plaintiffs barred from bringing diversity suits in the state of their citizenship would have the ability to find another federal forum; to the extent that this ability exists, we may have overstated the effect of the bar. As with the changes in the jurisdictional amount, our estimates of juror activity and appellate activity are based on those appeals and trials on which we were able to match from one data set to another.

The estimates are as follows:

65	District judgeships	$ 28,847,000
9	Full-time magistrates	2,544,300
3.31%	Time of part-time magistrates	98,307
53,781	Juror days	2,554,598
156	District court deputy clerks	4,357,860
7	Court of appeals judgeships	3,208,905
16	Court of appeals deputy clerks	446,960
13	Administrative Office positions	444,600
45	fewer judges and 5 fewer magistrates attending FJC seminars	29,625
		$ 42,532,155

APPENDIX A

Estimation Methods

This appendix describes the methods of estimating the resources attributable to the diversity jurisdiction. Appendix B describes the cost factors that are attached to these resources.

Unless otherwise indicated, references to tables are to tables in the 1986 Annual Report of the Director of the Administrative Office, and refer to data for the statistical year 1986.

District Judgeships

In making recommendations to Congress about the number of district judgeships, the Judicial Conference relies heavily on its Committee on Court Administration and that committee's Subcommittee on Judicial Statistics. The recommendations are largely based on the view that a reasonable caseload for a district judge is 400 weighted case filings per year. The number of weighted filings is derived by assigning weights to types of cases (such as "Diversity--motor vehicle personal injury"); the weights reflect the relative amount of judge time required to dispose of such cases, as determined in a 1979 time study. (S. Flanders, The 1979 Federal District Court Time Study (Federal Judicial Center 1980).)

Other factors also go into the recommendations, including such factors as the number of pending cases and whether a district believes that it needs additional judicial personnel. In developing an estimate of the number of judgeships attributable to diversity cases, it is of course not practicable to simulate the judgmental factors that go into actual decisions. Weighted filings appear to be the best objective estimator.

The judgeship recommendations approved at the September 1986 session of the Judicial Conference would in fact have resulted in 421 weighted filings per judgeship, based on the data (for calendar 1985) that was before the subcommittee when the recommendations were developed. We have therefore assumed that a judgeship is equivalent to 421 weighted filings.

In the year ending June 30, 1986, there were 63,672 diversity cases filed in the district courts, representing 80,664 weighted filings. (Table C2; unpublished Administrative Office data.) At 421 weighted filings per judgeship, this translates to 192 judgeships. It may be noted that diversity cases accounted for 25.0 percent of the civil cases filed but 34.5 percent of the weighted civil filings. The greater burden imposed by the diversity cases is largely a result of the fact that these cases go to trial much more frequently than other civil cases.

As is noted in text, the 192 judgeships should be considered in the context of the 631 judgeships that would be authorized if the pending Judicial Conference recommendations were accepted, rather than in the context of the 575 existing judgeships.

To estimate the impact of changes in the jurisdictional amount, we used the ad damnum reported to the Administrative Office. As is noted in text, there is a substantial underreporting problem with this item. Cases in which the item was reported accounted for 52,907 of the weighted filings in diversity cases, of which 24.59 percent did not exceed $25,000, 35.74 percent did not exceed $50,000, and 46.83 percent did not exceed $100,000. These percentages were applied to the total of 80,664 weighted filings in diversity cases and then divided by 421 to estimate the number of district judgeships involved. It is noted that we had no way of excluding the interpleader cases, which would not be affected by the change in jurisdictional amount under H.R. 4315; as is argued in text, however, their impact on the data would surely be small.

To estimate the impact of the proposal to bar plaintiffs from invoking the diversity jurisdiction in districts in their home states, we used data reported to the Administrative Office on "origin" of the case and plaintiff's citizenship. For 76,101 of the weighted filings in diversity cases, the case was reported to be either an original proceeding or a case removed from state court. (Other cases were coded as remands, reinstated cases, and similar characterizations that do not indicate the basis of jurisdiction.) Of the 76,101 filings, 34.08 percent were cases brought in the state of the plaintiff's citizenship. This percentage was applied to the total of 80,664 weighted filings, and the product was again divided by 421.

The codes used by the Administrative Office to indicate citizenship have been changed recently, with the result that there is considerable ambiguity about the meaning of most of the codes on the 1986 data tape. Only the code indicating "citizen of this state" has remained constant.

Magistrates' Activity

There is little basis for arriving at an informed estimate of the amount of magistrate time devoted to diversity cases.

Magistrate positions are approved by the Judicial Conference on the basis of surveys of individual districts, and there are no benchmarks used that are similar to the weighted caseload figures used for recommending new district judgeships. Moreover, there have been no studies that would provide a basis for estimating the relative amount of time consumed by various magistrate activities.

The statistical data routinely collected about magistrates are primarily transaction-based rather than case-based. Magistrates report the number of pretrial conferences held, the number of motions on which a report and recommendation is made, etc. However, some case-based data are also reported. While the data distinguish magistrate participation in civil cases from participation in criminal cases, they do not distinguish between diversity cases and other civil cases.

In order to arrive at a very rough approximation of the extent to which magistrate time is devoted to diversity cases, we begin with a summary of the magistrate activity reported in the 1986 Annual Report:

Activities Involving Criminal Cases, Prisoner Petitions, and Social Security Cases

92,269	Misdemeanor defendants disposed of (13,219 after trial) (table M-2)
131,070	Preliminary criminal matters disposed of, such as conducting initial appearances and arraignments and issuing search warrants (table M-3)
37,431	Motions disposed of, pretrial conferences held, etc., in criminal cases (table M-4)
35,521	Recommendations on prisoner petitions and social security cases (table M4-A)
296,291	

Activities Involving Civil Cases Other Than Prisoner Petitions and Social Security Cases

4,960	Civil cases disposed of (assigned with consent of the parties under 28 U.S.C. § 636(c)) (984 with trials) (tables M4-A, M-5)
146,252	Motions disposed of, pretrial conferences held, etc., in civil cases (table M4-A)
1,079	Assignments completed as special master in civil cases (261 with hearings) (tables M4-A, M-5)
152,291	

The activities in the first group are clearly not in cases based on the diversity jurisdiction. The activities in the second group are in cases in which the data do not disclose the basis of jurisdiction. In the 1986 statistical year, 206,656 civil cases were commenced in the district courts other than prisoner petitions and social security cases; 63,672, or 30.8 percent, were diversity cases. (Table C2.) Hence, one might guess that 46,906 of the reported magistrate activities in the second group were in diversity cases, which would be slightly over 10 percent of all the reported activities.

We have no solid basis for the assumption that the activities in the second group are divided proportionately among diversity cases and others. Based on data collected for another study, we know that the diversity jurisdiction's share of the motions and pretrial conferences in the second group varies substantially from district to district. These data, which embrace nine districts for the 1982 statistical year, do not suggest that the 30.8% assumption is implausible as a national average. The true proportion could be quite different, however.

We also have no basis in data for assuming that a reportable activity in a diversity case is about as burdensome, on the average, as a reportable activity in a criminal case or a civil case with some other jurisdictional basis. We therefore attribute 10 percent of the cost of the magistrate system to diversity cases not because we have confidence in the estimate but because we think it is better than nothing and we are unable to do better. The figure is subject to substantial error, but probably tells us reliably that diversity matters are a reasonably small proportion of magistrates' work.

To estimate the impact on magistrates of changes in the jurisdictional amount and of the proposal that would bar plaintiffs from invoking the diversity jurisdiction in their home states, we used methodology almost identical to that used in estimating the impact of these changes on district judgeships. However, consistently with the way in which we attributed magistrates' time to diversity cases generally, we used unweighted filings rather than weighted filings. There were 41,672 diversity cases in which the ad damnum was reported, of which 24.57 percent did not exceed $25,000, 36.12 percent did not exceed $50,000, and 47.58 percent did not exceed $100,000. There were 60,277 diversity cases that were reported as either original proceedings or removals, of which 33.09 percent were original proceedings brought in the state of plaintiff's citizenship. These percentages were applied to the estimate that 10 percent of magistrates' time is devoted to diversity cases, thus arriving at the reduced percentages applicable to these more limited proposals.

The data do not distinguish between the activities of part-time magistrates and those of full-time magistrates, and we have therefore assumed that the activities of both would be reduced proportionately. In fact, full-time magistrates probably perform a disproportionate amount of the work associated with civil cases.

Juror Costs

For 1986, the Administrative Office reported a total of 705,819 juror days in connection with petit juror service. (Administrative Office of the United States Courts, 1986 Grand and Petit Juror Service in United States District Courts, table 6.)

The estimating procedure we have used to attribute juror days to diversity cases involves separate steps for estimating juror days spent only in trial and those on which the juror was available for voir dire. The published statistics show that 338,022 of the juror days were on days on which the jurors were available for voir dire, leaving 367,797 juror days on which jurors were serving in trials but not present for voir dire. (*Id.*) We first allocated these two figures among criminal and civil cases. We then further allocated the civil figures between diversity and other litigation.

Juror days in trial--not present for voir dire

We began with number of days of jury trial reported. (*Id.*) It is emphasized that these are trial days, not juror days. In the statistical series on which the estimates are based, a trial is defined as beginning with the opening statement and ending when the jury is dismissed.

	Total	Civil	Criminal
Jury trial days	41,945	22,692	19,253

We then subtracted the number of trials that started on the day that jury selection was completed. (*Id.*, table 7). Each of these trials included one day that was also jury selection day, so the number of trials is the same as the number of trial days that were also selection days. By subtracting this number, we arrived at an estimate of the number of trial days in which the jurors were not available for voir dire.

	Total	Civil	Criminal
Jury trial days that were also jury selection day	8,239	4,746	3,493
Jury trial days not on jury selection day	33,706	17,946	15,760

We then converted the civil and criminal trial days that were not on jury selection day to juror days. The resulting estimates are as follows:

	Total	Civil	Criminal
Juror days when jurors not available for voir dire	367,797	138,184	229,613

The allocation was based on assumed averages of 7.7 juror days per civil trial day and 14.57 juror days per criminal trial day. Both of these figures are somewhat higher than we would have anticipated. It should be noted, however, that use of a lower assumed figure for one kind of trial would necessitate use of a higher assumed figure for the other, since there is a known number of juror days (367,797) to be accounted for.

The six-person jury has become very much the norm for civil cases in the federal courts, although twelve-person juries are still used in some districts. (See id., app. B.) A report of a 1981 survey indicated that two alternates is the norm for civil trials in about half the districts, and one alternate in about half. (Administrative Office, Clerks Division, Administration of the Jury System in the Federal Courts, p. 9 (1982).) The twelve-person jury of course remains the norm in criminal cases, and the survey indicated that two alternates is the norm in most districts. These figures might suggest estimates of 7.5 jurors per civil jury trial day and 14 per criminal jury trial day on the average. Since alternates are dismissed when the jury retires for deliberation, it could be argued that even these figures are on the high side. On the other hand, more alternates are generally used in longer trials. Unpublished data indicate that, of 3900 criminal jury trials, 268 (6.9%) lasted longer than ten days, not counting deliberation time, and that these cases accounted for 31.1 percent of the trial days. Among 5,222 civil trials, the corresponding figures are 257 (4.9%), accounting for 20.3 percent of the trial days. Hence, there may be a substantial number of trial days on which more than the usual number of jurors and alternates are present. Although our assumptions of 7.7 and 14.57 days are of course subject to error, they are thus not implausible. They are in any event unlikely to be grossly wrong.

Juror days when present for voir dire

In 1986, 10,567 juries were selected. (1986 Grand and Petit Jury Service, table 6.) 58.1% of the jury trials terminated were in civil cases and 41.9% were in criminal cases. (1986 Ann. Rep., tables C7, M2, M5). Although these latter data are based on trial terminations rather than on juries selected, we think it is reasonable to use them to estimate the civil and criminal proportions among the juries selected, and we have done so:

	Total	Civil	Criminal
Juries selected	10,567	6,139	4,428

The next step was to determine how many of the jurors available for voir dire were attributable to the civil cases. Our attribution is based on a guess that twice as many jurors must be available for a criminal case as for a civil case. As has already been noted, the six-person jury predominates in civil cases; a twelve-person jury is of course the norm in criminal cases. Our guess is based on the following calculations:

	Civil	Criminal
Jurors	6	12
Peremptory challenges	6	16
Alternates	1.7	2.6
Peremptory challenges	2.4	2.6
	16.1	33.2

In this calculation, the numbers for peremptory challenges are derived from 28 U.S.C. § 1870, Fed. R. Civ. P. 47, and Fed. R. Crim. P. 24. We have made a rough allowance for increases in the number of peremptory challenges when more than two alternates sit. The judge has discretion to expand the number of alternates in a multiparty case, but we have not been able to take account of that. The assumed numbers of alternates are based on the estimates developed above. Finally, our two-to-one assumption implies that the number of jurors called because of possible challenges for cause is approximately twice as great in the average criminal case as in the average civil case.

The two-to-one assumption results in a figure of 22.54 juror days available for voir dire in the average civil trial and 45.08

in the average criminal trial. In the 1981 survey referred to above, when districts were asked the size of panels called for civil and criminal trials, the median responses were 20 and 36, respectively. These figures would presumably be increased for long trials or highly publicized ones. Moreover, because of last-minute settlements or pleas, some panels are called but not used. Hence, the 22.54 and 45.08 assumptions do not seem implausible. If there is error, it seems likely that we have allocated too few juror days to the civil cases, which will tend to produce a conservative estimate of the juror days devoted to diversity cases.

	Total	Civil	Criminal
Juries selected	10,567	6,139	4,428
Juror days available for voir dire	338,022	138,387	199,635

Allocating jury days to diversity cases

We thus estimated that 138,184 juror days are attributable to civil trials when the jurors are not available for voir dire, and that 138,387 days are attributable when jurors are available. The next step was to allocate these civil days among diversity and nondiversity cases.

To accomplish this, we used the data tape underlying table C7 in the 1986 Annual Report of the Director of the Administrative Office. Of the 5222 civil jury trials reported as having terminated in 1986, 52.89 percent of the trials and 51.22 percent of the trial days were in diversity cases. We used the number of trials to allocate juror days available for voir dire and the number of trial days to allocate other juror days. Table C7 uses a slightly different definition of trial from that used in the juror statistics, in that it excludes deliberation time. It also excludes cases that settle after jury selection and before the introduction of evidence, cases that are relevant for the present purpose. Moreover, table C7 and the data about magistrates' trials, when taken together, report about 900 fewer jury trials than the number of juries that are reported as having been selected; this may be a consequence of excluding cases that settle after jury selection. Nevertheless, the data behind table C7 provide our best source for finding the proportions of civil trials and trial days that are attributable to diversity litigation.

The results of this last allocation are as follows:

	All Civil		Diversity
Juror days available for voir dire	138,387	(x .5289)	73,193
Juror days in trial when not available for voir dire	138,184	(x .5122)	70,778
Total			143,971

This total represents a little over a fifth of the total number of juror days reported for cases of all types.

To estimate the impact on juror days of proposals short of complete elimination of the diversity jurisdiction, we attempted to match cases in the data set that contains trial time to the same cases in the data set on which our filing information is based. Using district, office, and docket number as the basis for the match, we succeeded in 93.3 percent of the diversity cases in which a jury trial was reported.

We had 1,696 such cases in which the ad damnum was reported, with the following results:

Ad damnum not above--	Percent of Diversity Trials	Percent of Diversity Trial Days
$ 25,000	22.64%	25.07%
50,000	28.54	31.78
100,000	37.85	38.48

We used these percentages to allocate the number of juror days for diversity cases that was estimated in the previous table. We used number of trials to allocate the juror days when available for voir dire and trial days to allocate the juror days not available for voir dire.

We had 2,576 cases in which the origin code indicated either an original proceeding or a removal. Of these, cases that were original proceedings brought in the state of plaintiff's citizenship accounted for 37.38 percent of the trials and 37.33 percent of the trial days.

Once again, we have not been able to exclude interpleader cases in developing these estimates.

District Court Deputy Clerks

District court deputy clerk positions are authorized on the basis of a formula under which numbers of positions are calculated on the basis of a number of work measurement factors and then added together. The factors that we have considered call for one position for each--

147	Filings
7,400	Juror Days
263	Appeals
103	Law Clerks

We have calculated deputy clerk savings (other than for courtoom deputies, who are included with the judgeships) by applying these ratios. For the 1986 statistical year, there were 63,672 diversity cases filed. (Table C2.)
We have used the number of juror days and the number of appeals that we have estimated elsewhere, and have assumed that the number of law clerks is two per judgeship.

The work measurement factors that we have not considered are based on the number of attorneys admitted, the number of divisional offices, hours of senior judge activity, the number of prisoner petitions, the number of naturalization petitions, travel mileage, and Central Violations Bureau activity. As is noted elsewhere, a reduction in the number of judgeships would in the very long term result in reducing the number of senior judges, but we have not taken account of that in our estimates. A caseload reduction might result in some closing of divisional offices, an action that would also affect travel mileage, but we have no way of taking that possibility into account. The other factors are not relevant to the diversity jurisdiction.

As is noted in text, our estimates are based on the assumption that application of the staffing formula is the norm. At the present time, because of Gramm-Rudman-Hollings, staffing is at 94 percent of formula. If that were considered the norm, the 94 percent figure should also be applied to our estimates.

Appellate Judgeships

The Subcommittee on Judicial Statistics has recently adopted, for the purpose of making recommendations about appellate judgeships, a benchmark figure of 255 case participations per judgeship in appeals decided on the merits, or 85 filings per judgeship of appeals that will be decided on the merits. (Prisoner petitions, not relevant here, are counted as half-cases.) As with district judgeships, there are a number of discretionary factors that affect the final recommendations, but this benchmark figure appears to be the best objective estimator we have. It should be noted that the benchmark used for appellate cases does not, except for prisoner petitions, attempt to measure workload burden by case type. If diversity cases as a class are either more or less demanding of judge time than other cases within the appellate jurisdiction, our estimates would be somewhat skewed.

The judgeship recommendations approved at the September 1986 session of the Judicial Conference would in fact have resulted in an estimated 90 filings per judgeship of appeals that will be decided on the merits, based on the 1985 data that were before the subcommittee when the recommendations were developed. We have therefore assumed a judgeship to be equivalent to 90 such filings.

In the 1986 statistical year, there were 33,589 appeals filed in the courts of appeals (table B-1, excluding original proceedings), of which 3,834 were in diversity cases (table B-1A). To estimate the number of these that will be decided on the merits, we took the average of the proportions of appeals that were decided on the merits among those diversity appeals terminated in the 1985 and 1986 statistical years. (AO 1985 & 1986 Ann. Reps., table B-1A.) The average proportion of 51.83%, applied to the 1986 diversity filings, produces 1,987 appeals.* At 90 appeals per judgeship, this translates to 22 judgeships. The 22 should be considered in the context of the 169 judgeships that would be authorized if the pending Judicial Conference recommendations were accepted, rather than in the context of the 156 existing judgeships. (These figures do not include judgeships in the Court of Appeals for the Federal Circuit, which does not have diversity jurisdiction.)

The estimates do not take account of original proceedings (such as petitions for mandamus). There were 703 such proceedings filed in 1986 (table B-1), but we have no way of telling how many of them may have been related to diversity litigation. In the 1986 statistical year, 85.5 percent of the original proceedings terminated were terminated on the merits. (Table B-5.)

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* In considering the need for additional judgeships, the Statistics Subcommittee determines the proportion of decisions on the merits separately for each circuit. To smooth out year-to-year fluctuations, a five-year average is used. However, because of a change in the reporting system, data before 1985 only approximate the number of decisions on the merits. Because the national database is less subject to year-to-year fluctuation, we have used a two-year average, thereby avoiding the use of the pre-1985 data.

To estimate the impact on appellate judgeships of proposals short of complete elimination of the diversity jurisdiction, we attempted to match cases in the court of appeals data set to the same cases in the district court data set on which our filing information is based. Using district, office, and district court docket number as the basis for the match, we succeeded in 84.4 percent of the diversity appeals.

The ad damnum was reported for 1,854 of the matched appeals in diversity cases. 23.62 percent did not exceed $25,000, 30.69 percent did not exceed $50,000, and 39.59 percent did not exceed $100,000. The origin was reported as either an original proceeding or a removal in 3,235 of the matched appeals. Of these, 30.57 percent were original proceedings brought in the state of plaintiff's citizenship.

The above percentages were applied to our previous estimate of 1,987 diversity appeals to be decided on the merits. The resulting figure was divided by 90 to arrive at the estimated number of apellate judgeships.

Appellate Court Deputy Clerks

The current staffing formula calls for one deputy clerk for each 75 filings.

The 3,834 diversity filings in the 1986 statistical year are thus the equivalent of 51 deputy clerk positions.

As with district court deputy clerks, our estimates are based on the formula without adjustment for the Gramm-Rudman-Hollings limitations.

Administrative Office Support Staff

The estimates are based on one position for six judgeships and one position for 7.5 full-time magistrate positions.

We have not developed an estimate of the impact on Administrative Office staff of a reduction in deputy clerk positions. It is believed that the impact would be small.

Federal Judicial Center Education and Training Activities

The estimates are based on attendance at workshops each year by approximately two-thirds of all district judges, one-third of all circuit judges, and one-half of all full-time magistrates. Marginal training costs for people other than judicial officers are minimal, since the programs do not often involve travel and subsistence.

Court Security

No estimates have been made of savings in court security costs.

Security costs covered by the Administrative Office budget are largely for perimeter security, which would be reduced only if the number of courthouse entrances were reduced. The Administrative Office also spends funds for such items as closed circuit television, and it might be expected that these expenditures would be reduced somewhat if the number of judgeships were reduced. We think the reduction would be relatively small, however, and we have no good basis for putting a dollar figure on it.

Security provided by the Marshals Service is principally related to the criminal docket. We believe any savings attributable to limiting jurisdiction in civil cases would be small. Again, we have no sound basis for developing a dollar figure.

APPENDIX B

Cost Factors

District Judge and Judge's Staff*

Judge's salary and benefits	$ 95,400
Salaries and benefits for two law clerks, court reporter, secretary, and 1.5 courtroom deputy clerks	205,600
Travel, judges and staff	8,500
Miscellaneous expenses (communications, supplies, etc.)	12,100
Recurring equipment and library costs	16,700
Space and facilities	105,500
	$443,800

Full-time Magistrate and Staff

Magistrate's salary and benefits	$ 88,012
Salaries and benefits for one legal assistant, one secretary, and one clerical assistant	102,488
Travel, magistrate and staff	2,000
Miscellaneous expenses (communications, supplies, security investigation, etc.)	11,100
Recurring equipment and library costs	13,800
Space and facilities	65,300
	$282,700

Part-time Magistrates

Total system costs (including salaries, benefits, and expenses)	$2,970,000

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* A district court with ten or more judges is entitled to a court reporter co-ordinator. The chief judge of a district court with five or more judges is entitled to an additional secretary. Since the estimates have not been prepared on a court-by-court basis, these positions are not taken into account. Their impact would, of course, be minor.

Jurors

Cost per petit juror per day (including fees, subsistence, mileage)	$ 47.50

Court of Appeals Judge and Judge's Staff

Judge's salary and benefits	**$101,300**
Salaries and benefits for three law clerks, two secretaries, one central staff attorney, and 0.5 staff attorneys' secretaries	**241,615**
Travel, judges and staff	**16,000**
Printing of opinions	**14,000**
Miscellaneous expenses (communications, supplies, etc.)	**15,600**
Recurring equipment and library costs	**19,100**
Space and facilities	**50,800**
	$458,415

Deputy Clerk (District or appellate court)*

Salary and benefits	$ 26,127
Miscellaneous expenses	1,608
Recurring equipment costs	200
	$ 27,935

Administrative Office Support Staff

Cost per support position, including salaries, benefits, and overhead	$ 34,200

Federal Judicial Center Education and Training Costs

Travel and subsistence for attending a workshop:	
Per attending judge	$ 600
Per attending full-time magistrate	525

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* The estimates do not include space and facilities costs for deputy clerks. We have been unable to arrive at a satisfactory allocation of these costs.

APPENDIX A

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510

JOSEPH R. BIDEN, JR., DELAWARE, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS
ROBERT C. BYRD, WEST VIRGINIA
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CHARLES E. GRASSLEY, IOWA
ARLEN SPECTER, PENNSYLVANIA
GORDON J. HUMPHREY, NEW HAMPSHIRE

[illegible], CHIEF COUNSEL
[illegible], STAFF DIRECTOR
[illegible], MINORITY CHIEF COUNSEL

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
HOWELL HEFLIN, ALABAMA, CHAIRMAN

HOWARD M. METZENBAUM, OHIO
DENNIS DeCONCINI, ARIZONA

CHARLES E. GRASSLEY, IOWA
STROM THURMOND, SOUTH CAROLINA

[illegible], CHIEF COUNSEL
[illegible], MINORITY CHIEF COUNSEL

April 30, 1987

Mr. Ralph Mecham, Director
Administrative Office of
the United States Courts
811 Vermont Avenue, N.W.
Washington, D.C. 20544

Dear Mr. Mecham:

The 100th Congress offers a tremendous opportunity for the legislative and judicial branches of government to cooperate in the resolution of some important issues concerning the administration of justice in this nation. As Chairman of the Subcommittee on Courts and Administrative Practice, I look forward to working with you and the Judicial Conference in identifying critical issues and striving to solve them.

It would be beneficial to encourage an even greater exchange between this subcommittee and the judicial branch. This month I introduced legislation on Administrative Law Judges, Voir Dire, Mandatory Jurisdiction of the Supreme Court, Federal Courts Study Act, and a Constitutional Amendment regarding Impeachment of Article III Judges. I would appreciate your comments on these bills, and, likewise, look forward to receiving suggestions from you on any judicial matters.

In pursuing our goals, I look forward to working with the distinguished Chairman of the House Courts, Civil Liberties and Administration of Justice Subcommittee, Representative Robert W. Kastenmeier, as well as the dedicated members of the judicial branch. This Congress offers one of the best environments in recent years to pass meaningful judicial improvement legislation, so I have directed our subcommittee staff to explore with you and your staff any legislative efforts on which we can cooperate.

Sincerely,

Howell Heflin

Howell Heflin

HH/kkk

APPENDIX B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 17, 1987

Honorable Howell Heflin
Chairman, Subcommittee on Courts
and Administrative Practice
Committee on the Judiciary
United States Senate
223 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your invitation to comment on the principle embodied by your bill, S. 952, which eliminates the statutory mandatory jurisdiction provisions affecting the Supreme Court. A unanimous Court has reiterated its support for this type of bill on several occasions during the past decade including letters to Congressional leaders in 1984, 1982, and 1978. I am authorized and pleased to again transmit the unanimous view of the Supreme Court endorsing elimination of the Court's mandatory jurisdiction.

On behalf of the Court, I appreciate your willingness to make this a high priority issue of the Subcommittee and to solicit our views on the content of the bill.

Sincerely,

William H Rehnquist

APPENDIX C

Side-by-Side Comparison of Supreme Court Mandatory Jurisdiction Bills

	S. 952 (as reported)	S. 1482	H.R. 3152
1.	Repeals 28 U.S.C. 1252	Same	Same
2.	Deletes 28 U.S.C. 1254(a)	Same	Same
3.	Restates 28 U.S.C. 1257 to delete references to "appeal."	Same	Same
4.	Restates 28 U.S.C. 1258 to delete references to "appeal."	Same but provides for certiorari jurisdiction where supreme court of Puerto Rico finds a statute of one of the 50 States to be unconstitutional.	Same as S. 1482
5.	Repeals 28 U.S.C. 2103 and conforms the table of sections	Repeals S 2103 but does not conform the table of sections.	Repeals S2103 and conforms the table of sections
6.	Amends 28 U.S.C. 2104 to delete direct appeal for State courts	Same	Same
7.	Treatment of Specific Statutes with Direct Appeal Language		
	2 U.S.C. 437h(b) - Language deleted	Same	Same
	25 U.S.C. 652 - Language not deleted	Same	Same
	43 U.S.C. 1652(d) - Language deleted	Same	Same
	45 U.S.C. 719(e)(3) - Language deleted	Same	Same
	45 U.S.C. 743(d) - Language deleted	Same	Same
	45 U.S.C. 1105(b) - Language deleted	Same	Same
	22 U.S.C. 1631(e) - Language deleted	Same	Same
	15 U.S.C. 29 - Not deleted	Language deleted	Same
	7 U.S.C. 136W(a)(4)(E) - Language deleted	Same	Same
	15 U.S.C. 57a-1(f) - Not deleted	Language deleted	Same
	16 U.S.C. 1463a(e) - Not deleted	Language deleted	Not deleted
8.	Effective date of 90 days no effect on existing judgments	Same	Same

APPENDIX D

TITLE II - JURY SELECTION AND SERVICE AMENDMENTS

. . . .

JURY SELECTION PLAN AMENDMENTS

Sec. 203. (a) Section ~~1863(b)~~ 1869(a) of title 28, United States Code, is amended by—

~~(1) striking out the words "or clerk" in paragraph (3) and inserting in lieu thereof ", clerk or other persons authorized by the court";~~ and

to read as follows:

OPTIONAL FORM NO. 10
(REV. 1-80)
GSA FPMR (41 CFR) 101-11.6
5010-114

GPO : 1987 O - 173-680

"(a) "clerk" and "clerk of the court" shall mean the clerk of the district court of the United States, any authorized deputy clerk, or any other persons authorized by the court to assist the clerk in the performance of functions under this Act;".

(b) ~~(2) amending~~ paragraph (6) of section 1863(b) of title 28, United States Code, is amended to read as follows:

"(6) specify that ~~the following persons are barred from jury service on the ground that they are exempt~~ ~~(i)~~ members in active service in the Armed Forces of the United States~~;~~ ~~(ii)~~ members of the fire or police departments of any State~~, district, territory, possession,~~ or subdivision thereof~~;~~ ~~(iii)~~ public officers in the executive~~, legislative,~~ or ~~judicial~~ branches of the Government of the United States~~,~~ or any State~~, district, territory,~~ or possession or subdivision thereof~~,~~ who are actively engaged in the performance of official duties are barred from jury service on the ground that they are exempt.".

. . . .

TECHNICAL AMENDMENTS

Sec 205. (a) The second sentence of section 1865(a) of title 28, United States Code, is amended by deleting the words "the alphabetical" and inserting in lieu thereof the following, "in any alphabetical".

(b) Paragraph (i) of section 1869 of title 28, United States Code, is deleted, and paragraphs (j), (k) and (l) are redesignated (i), (j) and (k), respectively.

Analysis

Both of these changes are essentially extensions of previous amendments approved by the Judicial Conference.

The first change permits district courts to authorize not only their clerks and deputy clerks but also non-court personnel to assist in performing jury selection functions. The technical amendments bill originally forwarded by the Conference purported to authorize the use of non-court personnel to assist in any jury selection function, but the bill in fact amended only section 1863(b)(3), which governs the selection of names from source lists and the creation of the master wheel. As a technical matter, then, this change authorized such assistance only in filling the master wheel, which was an unnecessarily narrow approach. While assistance in filling the master wheel continues to be desirable (for example, GSA computer technicians, private computing firms, and employees of State governments can perform this work more efficiently and economically than can court personnel), it should not be restricted to this one task. Non-court personnel can also be of much assistance in other functions, such as filling the qualified wheel.

As an example of this latter category, the Judicial Conference is currently conducting an experiment in which the juror qualification questionnaire has been re-designed so that it can be "read" by optical scanning devices. In this format, prospective jurors fill in "bubbles" with pencil and the forms are then "read" by the optical scanner. (By contrast, the current questionnaire contains boxes which jurors check. Deputy clerks manually read each of these forms to make preliminary determinations as to which prospective jurors are qualified, not qualified, or requesting an excuse.) The machine reads the forms far faster than human beings, and does so with greater accuracy—the machine never gets fatigued after reading several hundred documents. This technology therefore promises to save hours of dreary, repetitive labor in clerks' offices. However, optical scanning devices of sufficient sophistication to read volumes of questionnaires are too expensive (at least for now) to be purchased by individual courts; thus use of machines owned and operated by out-of-court personnel is necessary. Unfortunately, the

Jury Act does not literally authorize anyone but the clerk and deputy clerks to process the questionnaires in the first instance.

As a mechanical matter, the Jury Selection and Service Act could be amended in every instance in which the duties of clerks are set forth, but it is much simpler merely to amend the general definition of "clerk" appearing in section 1869(a) to include not only the clerk and deputy clerks but also such other non-court personnel as authorized by the court. In this way, every time the Act identifies a function to be performed by "the clerk," the court is authorized—but not required—to turn to outside personnel to assist the clerk in performing that task. The amendment to section 1869(a), then, is in lieu of the original proposed amendment to section 1863(b)(3).

The second amendment deals with the classes of persons who are barred or exempt from service under the Act; that is, who cannot serve even if they wish to. Section 1863(b)(6) now provides that three categories of persons must be exempted in each court's jury selection plan: those in active service in the Armed Forces; members of fire and police departments; and "public officers" of any branch of Federal or State government. (The term "public officer" is defined at section 1869(i) to mean "any person who is either elected to public office or who is directly appointed by a person elected to public office".) This section further authorizes district courts to exempt other groups of persons or occupational classes if it is found "that their exemption is in the public interest and would not be inconsistent with sections 1861 and 1862 of this title."

The Conference originally proposed amending this section to eliminate the possibility of courts expanding upon the three enumerated classes. Noting that the Jury Act contains a declaration of policy in favor of universal service on Federal juries and that few, if any, courts actually specify any additional classes of exemptions, the Conference proposed that the three categories specified in section 1863(b)(6) be considered exclusive. It is now proposed that this approach be extended and that the three categories of mandatory exemptions be cut back to one.

Specifically, the amendment calls for eliminating the automatic exemption offered to members of police and fire departments and to "public officers"; only the exemption for active duty members of the Armed Forces would remain. These exemptions were carried over in the Jury Selection and Service Act of 1968 without change from 1948 legislation, apparently with little, if any, deliberation. The assumption underlying the exemptions in the 1948 legislation was that individuals in these categories had critical jobs affecting the public health, safety, or welfare, and that it would be a waste of a court's time to attempt to include them on juries. Modern experience has shown, however, that many individuals who literally fall within the scope of the exemptions can in fact serve. Many "public officers," such as elected school board members who meet only on certain evenings, or clerical staff directly appointed by elected officials, encounter no more difficulty in serving than any other individuals. Even Federal judges, who are barred from service on Federal juries, have successfully served as jurors in state courts. An automatic, non-waivable exemption for such persons conflicts sharply with the declared policy of the Jury Act that all citizens called for jury duty shall have the opportunity and obligation to serve. Furthermore, courts have encountered many administrative problems in applying these exemptions. It is difficult, for example, to determine whether state legislators who are in session only a few months of the year, or police officers who work 20 to 30 hours a week, are "actively engaged" in their duties.

In sum, the Jury Act does not need the exemptions for public officers and members of police and fire departments. The Act already contains a comprehensive and easy-to-administer system for handling requests for excuses on an individual basis, and there is no reason why individuals in these categories should not be required to demonstrate a specific need for an excuse in the same manner as all other prospective jurors.

Accordingly, it is proposed that section 1863(b)(6) be amended to require that each district court's jury selection plan exempt only members of the Armed Forces on active duty. Since the term "public officer" will thus be deleted, the definition of that term now appearing at section 1869(i) should also be eliminated, and paragraphs (j), (k) and (l) of that section be redesignated as (i), (j) and (k).

APPENDIX E

[EXCERPTS FROM H.R. 3152]

100TH CONGRESS
1ST SESSION

H. R. 3152

To amend title 28, United States Code, to make certain improvements with respect to the Federal judiciary, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 6, 1987

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 28, United States Code, to make certain improvements with respect to the Federal judiciary, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Court Reform and Access to Justice Act of 1987".

(b) TABLE OF CONTENTS.—The table of contents is as follows:

Sec. 1. Short title and table of contents.
Sec. 2. Reference to title 28, United States Code.

TITLE I—MANDATORY JURISDICTION OF THE SUPREME COURT

Sec. 101. Review of decisions invalidating Acts of Congress.

Sec. 102. Review of decisions invalidating State statutes.
Sec. 103. Review of State Court decisions involving validity of statutes.
Sec. 104. Review of decisions from Supreme Court of Puerto Rico.
Sec. 105. Other conforming amendments to title 28.
Sec. 106. Amendments to other laws.
Sec. 107. Effective date.

TITLE II—RULES ENABLING ACT

Sec. 201. Rules Enabling Act amendments.
Sec. 202. Compilation and review of local rules.
Sec. 203. Rules by certain courts and orders by circuit judicial councils and the Judicial Conference.
Sec. 204. Conforming and other technical amendments.
Sec. 205. Savings provision.
Sec. 206. Effective date.

TITLE III—ARBITRATION

Sec. 301. Arbitration authorization by district courts.
Sec. 302. Model procedures.
Sec. 303. Reports.
Sec. 304. Effect on judicial rulemaking powers.
Sec. 305. Authorization of appropriations.
Sec. 306. Repeal.
Sec. 307. Appeals under title 9, United States Code.
Sec. 308. Effective date.

TITLE IV—FEDERAL JURISDICTION REFORM

Subtitle A—Multiparty, Multiforum Jurisdiction

Sec. 401. Jurisdiction of district courts.
Sec. 402. Venue.
Sec. 403. Multidistrict litigation.
Sec. 404. Actions removable generally.
Sec. 405. Choice of law.
Sec. 406. Service of process.

Subtitle B—Diversity Reforms

Sec. 411. Amount in controversy in diversity cases.
Sec. 412. Diversity in cases involving multistate corporations or representative parties.

TITLE V—FEDERAL JUDICIAL CENTER

Sec. 501. Federal Judicial Center Foundation.
Sec. 502. Authority to implement history program.
Sec. 503. Authority to provide for training for persons outside the judicial branch.
Sec. 504. Appointment and compensation of the Deputy Director of the Center.

TITLE VI—TEMPORARY EMERGENCY COURT OF APPEALS

Sec. 601. Transfer of jurisdiction of the court.
Sec. 602. Abolition of the court.

giving appropriate public notice and an opportunity for comment. Any such order so relating shall take effect upon the date specified by such judicial council. Copies of such orders so relating shall be furnished to the Judicial Conference and the Administrative Office of the United States Courts and be made available to the public.".

(c) Rules by Judicial Conference and Circuit Judicial Councils.—Section 372(c)(11) is amended by inserting before "Any rule promulgated" the following new sentence: "Any such rule shall be made or amended only after giving appropriate public notice and an opportunity for comment.".

SEC. 204. CONFORMING AND OTHER TECHNICAL AMENDMENTS.

(a) Conforming Repeal of Criminal Rules Enabling Provisions.—(1) Chapter 237 of title 18, United States Code, and the item relating to chapter 237 in the table of chapters for part II of such title, are repealed.

(b) Conforming Amendments Relating to Magistrates.—(1) Section 3402 of title 18, United States Code, is amended by striking out the second paragraph.

(2) Section 636(d) of title 28, United States Code, is amended by striking out "section 3402 of title 18, United States Code" and inserting "section 2072 of this title" in lieu thereof.

(c) CROSS REFERENCE TECHNICAL AMENDMENT.—Section 9 of the Act entitled "An Act to provide an adequate basis for the administration of the Lake Mead National Recreation Area, Arizona and Nevada, and for other purposes" approved October 8, 1964 (Public Law 88–639; 6 U.S.C. 460n–8) is amended by striking out the sentence beginning "The provisions of title 18, section 3402".

SEC. 205. SAVINGS PROVISION.

The rules prescribed in accordance with law before the effective date of this title and in effect on the date of such effective date shall remain in force until changed pursuant to the law as amended by this title.

SEC. 206. EFFECTIVE DATE.

This title shall take effect December 1, 1988.

TITLE III—ARBITRATION

SEC. 301. ARBITRATION AUTHORIZATION BY DISTRICT COURTS.

(a) IN GENERAL.—Title 28, United States Code, is amended by inserting after chapter 43 the following new chapter:

"CHAPTER 44—ARBITRATION

"Sec.
"651. Authorization of arbitration.
"652. Jurisdiction.
"653. Powers of arbitrator; arbitration hearing.
"654. Arbitration award and judgment.
"655. Trial de novo.
"656. Certification of arbitrators.
"657. Compensation of arbitrators.
"658. District courts that may authorize arbitration.

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"§ 651. Authorization of arbitration

"(a) AUTHORITY OF CERTAIN DISTRICT COURTS.—Each United States district court described in section 658 may authorize by local rule the use of arbitration in any civil action, including ~~a bankruptcy case or proceeding~~ an adversary proceeding in bankruptcy. Such arbitration shall be conducted in accordance with the provisions of this chapter.

"(b) TITLE 9 NOT AFFECTED.—This chapter shall not affect title 9.

"§ 652. Jurisdiction

"(a) ACTIONS THAT MAY BE REFERRED TO ARBITRATION.—(1) Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c) of this section, a district court that authorizes arbitration under section 651 may—

"(A) allow the referral to arbitration of any civil action (including any ~~bankruptcy case or proceeding)~~ adversary proceeding in bankruptcy) pending before it if the parties consent to arbitration, or

"(B) require the referral to arbitration of any civil action pending before it if the relief sought consists only of money damages not in excess of $1~~0~~50,000 or such lesser amount as the district court may set, exclusive of interest and costs.

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"(2) For purposes of paragraph (1)(B), a district court may presume damages are not in excess of $\$1\overset{5}{0}0{,}000$ per claim unless counsel certifies that damages exceed such amount and provides docume for such certification.

"(b) Actions That May Not Be Referred.—Referral to arbitration under this chapter may not be made—

"(1) of an action based on an alleged violation of a right secured by the Constitution of the United States, or

"(2) if jurisdiction is based in whole or in part on section 1343 of this title.

"(c) Exceptions From Arbitration.—A district court may establish by local rule procedures for excepting from arbitration, for good cause shown, individual cases that would otherwise be referred under subsection (a).

"(d) Safeguards in Consent Cases.—In any civil action in which arbitration by consent is allowed under subsection (a)(1)(A), the district court shall by local rule establish procedures to ensure that—

"(1) consent to arbitration is freely and knowingly obtained, and

"(2) no party or attorney is prejudiced for refusing to participate in arbitration.

"§ 653. Powers of arbitrator; arbitration hearing

"(a) Powers.—An arbitrator to whom an action is referred under section 652 shall have, within the judicial dis-

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trict of the district court which referred the action to arbitration, the power—

"(1) to conduct arbitration hearings,

"(2) to administer oaths and affirmations, and

"(3) to make awards.

"(b) Time for Beginning Arbitration Hearing.—An arbitration hearing under this chapter shall begin within a time period specified by the district court, but in no event later than—

"(1) 180 days after the filing of an answer, or

"(2) 30 days after the disposition by the district court of any motion to dismiss the complaint, motion for judgment on the pleadings, or motion for summary judgment,

whichever is later unless the court determines that the circumstances of the case warrant an extension.

"(c) Subpoenas.—Rule 45 of the Federal Rules of Civil Procedure (relating to subpoenas) applies to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter.

"§ 654. Arbitration award and judgment

"(a) Filing and Effect of Arbitration Award.—An arbitration award made by an arbitrator under this chapter, along with proof of service of such award on the other party by the prevailing party or by the plaintiff, shall,

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promptly after the arbitration hearing is concluded, be filed with the clerk of the district court that referred the case to arbitration. Such award shall be entered as the judgment of the court after the time has expired for requesting a trial de novo under section 655. The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

"(b) TAXATION OF COSTS.—The district court may by rule allow for the inclusion of costs as provided in section 1920 of this title as a part of the arbitration award.

"§ 655. Trial de novo

"(a) TIME FOR DEMAND.—Within 30 days after the filing of an arbitration award with a district court under section 654, any party may file a written demand for a trial de novo in the district court.

"(b) RESTORATION TO COURT DOCKET.—Upon a demand for a trial de novo, the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration. Any right of trial by jury that a party otherwise would have had, as well as any place on the court calendar that a party otherwise would have had, is preserved.

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"(c) LIMITATION ON ADMISSION OF EVIDENCE.—The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless—

"(1) the evidence would otherwise be admissible in the court under the Federal Rules of Evidence, or

"(2) the parties have otherwise stipulated.

"(d) TAXATION OF ARBITRATOR FEES AS COSTS.—A district court may by rule allow arbitrator fees paid under section 657 to be taxed as costs in any trial de novo demanded under subsection (a). Any such rule shall—

"(1) require the court in considering such taxation to take into account whether the demand for a trial de novo was made for good cause, and

"(2) provide that no other penalty for demanding a trial de novo may be assessed by the court.

"(e) ASSESSMENT OF COSTS AND ATTORNEY FEES.—In any trial de novo demanded ~~under subsection (a) in which arbitration was done by consent of the parties~~, a district court may assess costs and reasonable attorney fees against the party demanding the trial de novo if such party fails to obtain a judgment, exclusive of interest and costs, in the court which is substantially more favorable to such party than the arbitration award and in a case in which arbitration was by consent the parties, the court determines that the party's conduct in seeking trial de novo was in bad faith.

"§ 656. Certification of arbitrators

"(a) STANDARDS FOR CERTIFICATION.—Each district court listed in section 651(b) shall establish standards for the certification of arbitrators and shall certify arbitrators to perform services in accordance with such standards and this chapter. The standards shall include provisions requiring that any arbitrator—

"(1) shall take the oath or affirmation described in section 453, and

"(2) shall be subject to the disqualification rules of section 455.

"(b) TREATMENT OF ARBITRATOR AS INDEPENDENT CONTRACTOR AND SPECIAL GOVERNMENT EMPLOYEE.—An arbitrator is an independent contractor and is subject to the provisions of sections 201 through 211 of title 18 that apply to a special Government employee of the executive branch. A person may not be barred from the practice of law because he is an arbitrator.

"§ 657. Compensation of arbitrators

"(a) COMPENSATION.—The district court may establish, subject to limits set by he Judicial Conference and pay the amount of compensation, if any, that each arbitrator shall receive for services rendered in each case.

"(b) TRANSPORTATION ALLOWANCES.—Under regulations prescribed by the Director of the Administrative Office of the United States Courts, a district court may reimburse

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arbitrators for actual transportation expenses necessarily incurred in the performance of duties under this chapter.

"§ 658. District courts that may authorize arbitration

"The district courts for the following judicial districts may authorize the use of arbitration under this chapter:

"(1) Northern District of California, District of Connecticut, Middle District of Florida, Western District of Michigan, Western District of Missouri, District of New Jersey, Eastern District and Southern District of New York, Middle District of North Carolina, Western District of Oklahoma, Eastern District of Pennsylvania, and Southern District and Western District of Texas.

"(2) Ten additional judicial districts, which shall be approved by the Judicial Conference of the United States. The Judicial Conference shall give notice of the 10 districts approved under this paragraph to the Federal Judicial Center and to the public.".

(b) CONFORMING AMENDMENT.—The table of chapters at the beginning of part III of title 28, United States Code, is amended by inserting after the item relating to chapter 43 the following new item:

"44. Arbitration .... 651".

SEC. 302. MODEL PROCEDURES.

The Judicial Conference of the United States may develop interim model rules for arbitration procedure under

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chapter 44 of title 28, United States Code, as added by section 301 of this Act. No model rule may supersede such chapter 44, this title, or any law of the United States.

SEC. 303. REPORTS.

(a) ANNUAL REPORT BY DIRECTOR OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS.—The Director of the Administrative Office of the United States Courts shall include in the annual report of the activities of the Administrative Office (required under section 604(a)(3) of title 28, United States Code) statistical information about the implementation of chapter 44 of title 28, United States Code, as added by section 301 of this Act.

(b) REPORT BY FEDERAL JUDICIAL CENTER.—Not later than $\overset{5}{4}$ years after the date of the enactment of this Act, the Federal Judicial Center, in consultation with the Director of the Administrative Office of the United States Courts, shall submit to the Congress a report on the implementation of chapter 44 of title 28, United States Code, as added by section 301 of this Act, which shall include the following:

(1) A description of the arbitration programs authorized by such chapter, as conceived and as implemented in the judicial districts in which such programs are authorized.

(2) A determination of the level of satisfaction with the arbitration programs in those judicial districts

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by a sampling of court personnel, attorneys, and litigants whose cases have been referred to arbitration.

(3) A summary of those program features that can be identified as being related to program acceptance both within and across judicial districts.

(4) A description of the levels of satisfaction relative to the cost per hearing of each program.

(5) Recommendations to the Congress on whether to terminate or continue chapter 44 of title 28, United States Code, or, alternatively, to enact an arbitration provision in title 28, United States Code, authorizing arbitration in all Federal district courts.

SEC. 304. EFFECT ON JUDICIAL RULEMAKING POWERS.

Nothing in this Act, or in chapter 44 of title 28, United States Code, as added by section 301 of this Act, is intended to abridge, modify, or enlarge the rulemaking powers of the Federal judiciary.

SEC. 305. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for the fiscal year ending September 30, 1988, to the judicial branch such sums as may be necessary to carry out the purposes of chapter 44 of title 28, United States Code, as added by section 301 of this Act. Such sums shall be allocated by the Administrative Office of the United States Courts to Federal judicial districts and the Federal Judicial Center. The funds so ap-

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propriated are authorized to remain available until expended, except that such funds may not be expended for the arbitration of actions referred to arbitration after the date of repeal set forth in section 306 of this Act.

SEC. 306. REPEAL.

Effective 5 years after the date of the enactment of this Act, chapter 44 of title 28, United States Code, as added by section 301 of this Act, and the item relating to that chapter in the table of chapters at the beginning of part III of such title, are repealed, except that the provisions of that chapter shall continue to apply through final disposition of all actions in which referral to arbitration was made before the date of repeal.

SEC. 307. APPEALS UNDER TITLE 9, UNITED STATES CODE.

(a) IN GENERAL.—Chapter 1 of title 9, United States Code, is amended by adding at the end thereof the following new section:

"§ 15. Appeals

"(a) An appeal may be taken from—

"(1) an order—

"(A) refusing a stay of any action under section 3 of this title,

"(B) denying a petition under section 4 of this title to order arbitration to proceed,

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"(C) denying an application under section 206 of this title to compel arbitration,

"(D) confirming or denying confirmation of an award or partial award, or

"(E) modifying, correcting, or vacating an award;

"(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

"(3) a final decision with respect to an arbitration that is subject to this title.

"(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

"(1) granting a stay of any action under section 3 of this title;

"(2) directing arbitration to proceed under section 4 of this title;

"(3) compelling arbitration under section 206 of this title; or

"(4) refusing to enjoin an arbitration that is subject to this title.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"15. Appeals.".

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SEC. 308. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), this title and the amendments made by this title shall take effect 180 days after the date of the enactment of this Act.

(b) EFFECTIVE DATE FOR SECTION 307.—The amendments made by section 307 shall take effect on the date of the enactment of this Act.

TITLE IV—FEDERAL JURISDICTION REFORM

Subtitle A—Multiparty, Multiforum Jurisdiction

SEC. 401. JURISDICTION OF DISTRICT COURTS.

(a) BASIS OF JURISDICTION.—Chapter 85 is amended by adding at the end the following new section:

"§ 1367. Multiparty, Multiforum Jurisdiction

"(a) The district courts shall have original jurisdiction of civil actions arising out of the same transaction, occurrence, or series of related transactions or occurrences, if—

"(1) any party is a citizen of a State and any adverse party is—

"(A) a citizen of another State;

"(B) a citizen or subject of a foreign state; or

"(C) a foreign state, as defined in section 1603(a) of this title; and

"(2)(A) any defendant resides in a State and—

"(i) a substantial part of the acts or omissions giving rise to the action occurred in any other State, even if a substantial part of such acts

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APPENDIX F

Improvements in removal procedure

It is recommended that the provisions of 28 U.S.C. governing removal procedure be amended as follows:

§ 1441(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by any ~~the~~ defendant ~~or the defendants,~~ to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

§ 1446(a) A defendant ~~or defendants~~ desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a ~~verified petition~~ notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure containing a short and plain statement of the ~~facts which entitle him or them to~~ grounds for removal together with a copy of all process, pleadings and orders served upon him ~~or them~~ in such action.

NOTE: if the petition procedure is changed to a notice procedure, it will be necessary to change all references to the petition for removal in later sections to "notice of removal," and to change references to the petitioner to the "removing party." See §§ 1446(b), (c)[throughout], (d), (e), § 1447(b).

§ 1446(b) [The first paragraph remains unchanged, apart from amending petition for removal to notice of removal.] If the case stated by the initial pleading is not removable, a notice of removal ~~petition for removal~~ may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by § 1332 of this title more than one year after commencement of the action.

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§ 1446(d) ~~Each petition for removal of a civil action or proceeding, except a petition in behalf of teh United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.~~

§ 1447(c) ~~If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.~~ A motion to remand the case on the basis of any defect in removal procedure must be made within thirty days of notice of removal. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses including attorney fees incurred as a result of the removal. A certified copy of the order of remand shall be mailed by ~~its~~ the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

§ 1447(d) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the state court.

§§ 1447(e) and (f) would be redesignated as (f) and (g) respectively.

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Section 1441(a). Two amendments are suggested for § 1441(a). The first permits removal by "any" defendant. The present statutory provision for removal by "the defendant or the defendants" has been interpreted to permit removal only if all defendants join in the removal petition. Two problems are presented by this interpretation. One problem, not often encountered, arises from combination of the requirement that all defendants join in removal with the fact that under § 1446(b), the time to remove begins to run when "the defendant" receives a copy of the initial pleading. Some courts have held that if the time for removal has run as to an early served defendant, removal is impossible even though all defendants wish to remove. The other problem is much more general. Any one defendant can thwart removal, no matter how cogent the reasons of other defendants for seeking removal. It is easily possible that the defendant who chooses to thwart removal is more closely aligned in interest with the plaintiff than the other defendants. The proposed amendment will resolve both problems.

This proposal has been before the Judicial Conference in March, 1986, and was rejected. The basis for rejection is not known, but may well have been concern about any step that increases access to federal jurisdiction. Although any increase in the workload of the federal courts should be scrutinized carefully, the Subcommittee believes that this amendment will not lead to a substantial increase in removal and that the cases that will be removed deserve access to the federal courts.

The other amendment to § 1441(a) permits the citizenship of fictitious defendants to be disregarded. This amendment addresses a problem that arises in a number of states that permit suits against "Doe" defendants. The primary purpose of naming fictitious defendants is to suspend the running of the statute of limitations. The general rule has been that joinder of Doe defendants defeats diversity jurisdiction unless their citizenship can be established, or unless they are nominal parties whose citizenship can be disregarded even if known. This rule in turn creates special difficulties in defining the time for removal. Removal becomes possible when the Doe defendants are identified or

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dropped, perhaps as late as the start of trial, or when it becomes clear that any claims against the Doe defendants are fictitious or merely nominal. At best, the result may be disruptive removal after a case has progressed through several stages in the state court. At worse, the result may be great uncertainty as to the time when removal becomes possible, premature attempts to remove and litigation over removability, and forfeiture of the removal opportunity by delay after the point that in retrospect seems to have made clear the right to remove. These problems can be avoided by the disregard of fictitious defendants for purposes of removal. Experience in the district courts in California, where Doe defendants are routinely added to state court complaints, suggests that in many cases no effort will be made to substitute real defendants for the Doe defendants, or the newly identified defendants will not destroy diversity. If the plaintiff seeks to substitute a diversity-destroying defendant after removal, the court can act as appropriate under proposed § 1447(d) to deny joinder, or to permit joinder and remand to the state court.

Section 1446(a). Minor changes are proposed for removal procedure. The present requirement of a verified petition is changed to a requirement that a notice of removal be signed pursuant to Civil Rule 11. This change is in keeping with general modern distaste for verified pleading. The sanctions available under Civil Rule 11 apply to every "other paper," but it seems desirable to make it clear that they are available in cases of improvident removal. The present requirement that the petition of removal state the facts supporting removal has led some courts to require detailed pleading. Most courts, however, apply the same liberal rules that are applied to other matters of pleading. The proposed amendment requires that the grounds for removal be stated in terms borrowed from the jurisdiction pleading requirement established by Civil Rule 8(a).

This amendment addresses the problems that arise from a change of parties as an action progresses toward trial in state court. The elimination of parties may create for the first time a party alignment that supports diversity jurisdiction. Under S 1446(b), removal is possible whenever this event occurs, so long as the change of parties was voluntary as to the plaintiff. Settlement with a diversity-destroying defendant on the eve of trial, for example, may permit the remaining defendants to remove. Removal late in the proceedings may result in substantial delay and disruption. The proposed amendment would establish a one-year limit on removal based on diversity jurisdiction as a means of reducing the opportunity for removal after substantial progress has been made in state court. The result is a modest curtailment in access to diversity jurisdiction, a consequence that will seem to some an attractive bonus and to others a price that must be paid for easing the impact of removal on continuing proceedings.

Section 1446(d). The bond requirement by S 1446(d) is abolished by the proposal to delete the section and redesignate the succeeding subsection. The proposed amendment to S 1447(c) will ensure that a substantive basis exists for requiring payment of actual expenses incurred in resisting an improper removal; Civil Rule 11 can be used to impose a more severe sanction when appropriate. The bond requirement imposes a cost that may be substantial to some litigants, and constitutes an additional procedural complication. A bond is not required on filing an action, and should not be required on removal.

Section 1447(c). Section 1447(c) now appears to requires remand to state court if at any time before final judgment it appears that the removal was improvident. So long as the defect in removal procedure does not involve a lack of federal subject matter

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jurisdiction, there is no reason why either state or federal courts, or the parties, should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn. The amendment provides a period of 30 days within which remand must be sought on any ground other than lack of subject matter jurisdiction. The amendment is written in terms of a defect in "removal procedure" in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only state law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded.

The proposal also would amend § 1447(c) to ensure that the court may order payment of actual expenses caused by an improper removal. As noted above, this provision would replace the bond provision now set out in § 1446(d), which covers payment of "all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."

Section 1447(d). This provision is new. It takes advantage of the opportunity opened by removal from a state court to permit remand if a plaintiff seeks to join a diversity-destroying defendant after removal. Joinder coupled with remand may be more attractive than either dismissal under Civil Rule 19(b) or denial of joinder. The flexibility built into the framework of Rule 19(b) fully supports this approach. This provision also helps to identify the consequences that may follow removal of a case with unidentified fictitious defendants, as noted above.

It would be possible to draft a broader amendment. The most obvious alternative would be to provide that "the court may deny joinder, dismiss the action, or permit joinder and either remand to the state court or retain jurisdiction." This approach would

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rely on the concept of pendant party jurisdiction, and justify departure from the traditional requirement of complete diversity by the advantages of permitting the most desirable joinder of parties without sacrificing the advantages of continuing proceedings that may be well under way in the federal court. The more modest approach was chosen instead in order to avoid the opposition that might be encountered by a proposal that would provide a small enlargement of diversity jurisdiction.

All of these proposals, other than the proposal to amend § 1441(a) to permit removal by any defendant, have been joined by the Federal-State Relations Subcommittee. All of these proposals also respond to Representative Kastenmeier's suggestion that it is desirable to study and improve on present removal practices.

APPENDIX G

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

March 4, 1987

Honorable James Wright
Speaker, United States
House of Representatives
H204 Capitol Building
Washington, D.C. 20515

Dear Mr. Speaker:

On behalf of the Judicial Conference of the United States, I am transmitting for consideration by Congress a draft bill which would eliminate the Federal courts' jurisdiction over civil actions grounded solely on diversity of citizenship. Litigation in the Federal courts continues to increase. One response to the mounting caseloads is to authorize additional judgeships to hear the additional cases. Today I have submitted draft legislation that would authorize additional judgeships, including fifty-six additional positions for the district courts. Each of the new positions has been determined by the Judicial Conference of the United States to be necessary to meet the burdens of the existing caseloads of the district courts.

The Judicial Conference also recognizes, however, that merely adding more judges will not stem the rising tide of increasing filings. Accordingly, on behalf of the Conference, I am also transmitting today the enclosed draft of a bill that would eliminate the Federal courts' jurisdiction over suits grounded solely on the basis that the parties are citizens of different States. According to reports filed by the clerks of the several district courts, this "diversity jurisdiction" accounted for approximately 60,000 new filings last year. The Judicial Conference has estimated that, if these cases were eliminated from our over-crowded court dockets, the number of additional district court judgeships that would be needed could be reduced from fifty-six to fifteen.

The Federal courts' primary responsibility is to determine litigation involving the application of Federal statutes and the Constitution. Diversity of citizenship actions, on the other hand, do not involve issues of Federal law but simply issues of State or local law that are allowed to be filed in Federal court only because the litigants happen to be citizens of different States. The volume of diversity cases now being filed constitutes an undesirable diversion of the resources of the Federal courts from their primary responsibility to resolve issues of Federal law. The problem of the impact of diversity jurisdiction on the workloads of the Federal courts has been the subject of hearings and legislative proposals in the last several Congresses. While substantial progress has been made through the efforts of concerned legislators, no bill dealing with this problem has yet been enacted. The Judicial Conference, after considerable deliberation, has concluded that full elimination of diversity jurisdiction is the best solution. While the Conference believes that is the best approach, the Conference has also considered and endorsed other proposals that would only reduce, but not eliminate, the burden of these cases. The record of the consideration of the impact of the diversity jurisdiction caseload is extensive and the Conference believes that the time has come to eliminate, or at least substantially reduce, this caseload.

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Representatives of the Judicial Conference and Administrative Office personnel will, of course, provide whatever assistance the Congress may request in reviewing this proposal.

Sincerely,

L. Ralph Mecham
Director

Enclosure

100th CONGRESS
1st SESSION

H.R.

To eliminate diversity of citizenship as a basis of jurisdiction of Federal district courts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. ______________________ introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To eliminate diversity of citizenship as a basis of jurisdiction of Federal district courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Diversity Jurisdiction Reform Act of 1987".

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SEC. 2. DIVERSITY JURISDICTION; AMOUNT IN CONTROVERSY.

(a) ELIMINATION OF DIVERSITY JURISDICTION. -- Section 1332(a) of title 28, United States Code, is amended by striking out paragraph (1) and redesignating paragraphs (2) through (4) as paragraphs (1) through (3), respectively.

(b) INCREASE OF AMOUNT IN CONTROVERSY. -- Subsections (a) and (b) of section 1332 of title 28, United States Code, are each amended by striking out "$10,000" and inserting in lieu thereof "$25,000".

SEC. 3. TECHNICAL AND CONFORMING AMENDMENTS TO TITLE 28.

The following provisions of title 28, United States Code, are amended:

(1)(A) The section heading for section 1332 is amended by striking out "Diversity of citizenship" and inserting in lieu thereof "Alienage".

(B) The item relating to section 1332 in the section analysis for chapter 85 is amended by striking out "Diversity of citizenship" and inserting in lieu thereof "Alienage".

(2) Section 1332(c) is amended to read as follows:

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"(c) For the purposes of this section and section 1335 of this title --

"(1) a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

"(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representatives of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.".

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(3) Section 1332(d) is amended by inserting "and section 1335 of this title" immediately after "section".

(4)(A) Section 1335(a)(1) is amended by striking out ", of diverse citizenship as defined in section 1332 of this title," and inserting in lieu thereof "of diverse citizenship".

(B) Section 1335 is amended by adding at the end the following new subsection:

"(c) For purposes of this section, the term "claimants of diverse citizenship" means claimants who are --

"(1) citizens of different States;

"(2) citizens of a State and citizens or subjects of a foreign state;

"(3) citizens of different States and citizens or subjects of a foreign state who are additional parties; or

"(4) a foreign state, as defined in section 1603(a) of this title, and citizens of a State or of different States.".

(5) Section 1342(1) is amended by striking out "diversity of citizenship" and inserting in lieu thereof "alienage".

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(6)(A) Section 1391(a) is amended by striking out "wherein jurisdiction is founded only on diversity of citizenship".

(B) Section 1391 is amended by striking out subsection (b) and redesignating subsections (c) through (f) as subsections (b) through (e), respectively.

(7) Section 1441 is amended by striking out subsection (b) and redesignating subsections (c) and (d) as subsections (b) and (c), respectively.

SEC. 4. AMENDMENTS RELATING TO THE TERRITORIES.

(a) Section 22(b) of the Organic Act of Guam, as amended, (48 U.S.C. S 1424(b)) is further amended to read as follows: "The District Court of Guam shall have the jurisdiction of a district court of the United States and shall have jurisdiction over all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between citizens of different states."

(b) The first sentence of section 22(a) of the Revised Organic Act of the Virgin Islands, as amended, (48 U.S.C. S 1612(a)) is further amended to read as follows: "The District Court of the Virgin Islands shall have the jurisdiction of a district court of the United States and shall have jurisdiction over all

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civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between citizens of different states."

(b) Section 2(a) of the Act of November 8, 1977, as amended, (48 U.S.C. § 1694a(a)) is further amended to read as follows: "The District Court of the Northern Mariana Islands shall have the jurisdiction of a district court of the United States and shall have jurisdiction over all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between citizens of different states.

"SEC. 5. EFFECTIVE DATE

The amendments made by this Act shall apply to any civil action commenced on or after the date of the enactment of this Act.

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United States District Court
Western District of Missouri
United States Courthouse
Kansas City 64106

Elmo B. Hunter
District Judge

April 14, 1988

Honorable Howell Heflin
Chairman, Subcommittee on Courts
and Administrative Practice
Committee on the Judiciary
United States Courts
223 Hart Senate Office Building
Washington, DC 20510-6275

Dear Mr. Chairman:

This is in response to your request for a reply to the question of Senator Thurmond on Court Annexed Arbitration. I have attached my reply.

If I may be of any further assistance to your Subcommittee during its consideration of S. 1482, the Judicial Branch Improvements Act of 1987, please do not hesitate to contact me.

Sincerely,

Elmo B. Hunter

Elmo B. Hunter

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Answer to Question from Senator Thurmond on Arbitration

As to the benefits of an arbitration program, I believe that arbitration is a program that, along with other reforms, could help alleviate the burdens associated with continued growth of the caseload of the Federal Judiciary and with the increasing costs of litigation to the litigants. There should be procedural mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the parties involved.

The Federal Judiciary is currently operating with a significant number of vacancies in authorized judgeships. In addition, the number of authorized judgeships enacted in 1984, was based upon our 1980 workload needs. Therefore, the Judicial Conference has been forced to find another solution. The Judicial Conference has recognized that increasing resources alone is not a complete answer to workload increases and has continually recommended abolition of diversity of citizenship jurisdiction, Article I Executive branch courts to review government benefit cases, and voluntary alternative dispute resolution techniques, such as arbitration, to ameliorate the problem.

As to the problems that might be anticipated, I do not think there will be any significant problems. In essence, the proposed arbitration measure in H.R. 3152, which is supported by the Judicial Conference of the United States if a small number of amendments are made, expands a pilot arbitration program that has been ongoing in the Federal courts for a decade. Studies of these pilot projects in some ten districts indicate a most favorable response from the courts, bar, and litigants. Experience has shown that exposure to and education about alternative dispute resolution techniques is an important initial factor. For example, some of the most successful use of arbitration in the pilot districts has occurred in districts located in States in which alternative dispute resolution methods are commonly used in the State courts. It would appear then that the only real impediment to an effective arbitration operation is one of education and exposure.

That does not mean that specific features in the bill might cause problems of one kind or another. One issue is whether or not smaller, more rural districts could operate in an arbitration program with the same standards used in the larger, metropolitan districts. For example, smaller and more rural districts have had difficulties in referring enough cases to arbitration to realize the benefits of arbitration due to the $100,000 limit on the jurisdictional amount. The Middle District of North Carolina has a limit of $150,000 as the jurisdictional amount and has a very successful program.

Another problem related to the question of jurisdictional amount is what is to be included in this amount: initial compensatory damage or compensatory damages, punitive damages, interest and costs? If all damages and costs are included, then few cases will be eligible for arbitration which would defeat our purpose.

In addition, in the past the Judicial Conference felt that enough favorable experience had been gained under the pilot projects to justify not limiting the program to specific courts plus ten additional courts. In its latest consideration of Congressman Kastenmeier's bill, the Conference accepted this limitation. While it is not a matter the Conference felt it should oppose, the Congress may wish to consider whether or not all district courts should be allowed to choose whether or not to participate in the program.

The Committee should also consider Senator Grassley's concern that the proposal unnecessarily restricts an alternative dispute resolution program to arbitration to the exclusion of other alternative dispute resolution techniques.

I appreciate the opportunity to comment further on this important subject.

RESPONSES OF JUDGE BILBY TO QUESTIONS OF SENATOR HEFLIN

The most critical need of the Federal Courts is automation. Unless Congress is willing to constantly create additional judgeships, it must allow us adequate funds to automate our docketing systems and offices.

Through the efforts of the Federal Judicial Center we now have available the necessary electronic docketing systems for civil, criminal and bankruptcy. All we need is the commitment of Congress to assist us in implementing these systems.

In addition, the Federal Judicial Center has developed an office automation system similar to the one used by United States Senators. Recently, I had the opportunity to display these systems in operation to Senator DeConcini. I urge you to discuss with him his observations of the efficacy and usefulness of these systems.

The installation of these critically needed systems will do more than anything else to improve the administration and efficiency of the Federal Courts.

Please help us.

Senator **Heflin**. Next is a panel, a one-man panel, the Honorable Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, Department of Justice.

Mr. Markman, we are delighted to see you. We will put you on the witness chair.

STATEMENT OF STEPHEN J. MARKMAN, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, DEPARTMENT OF JUSTICE

Mr. **Markman**. Thank you very much, Senator Heflin. I will try to do the work of a panel up here if I can.

I am pleased to appear before you this morning to present the views of the Department of Justice with respect to S. 1482. We commend the chairman for introducing and the subcommittee for holding hearings on this bill which is sponsored by the Judicial Conference of the United States, and which includes numerous specific proposals designed to improve the administration of justice.

As my prepared testimony makes clear, we support virtually all of the provisions of S. 1482, although in some instances we do make recommendations for modest revisions. We believe that S. 1482, as with its counterpart in the House, H.R. 3152, sponsored by Congressman Kastenmeier, contains a variety of important initiatives that should be promptly enacted into law.

We would be pleased to work with you and your staff as these measures proceed through the Congress. Any differences between these proposals and between the proposals of this administration, I believe, are greatly outweighed by the areas of agreement, and should be easily surmountable.

I will not restate my prepared remarks except to briefly note two policy areas not addressed in S. 1482 that we would recommend to this subcommittee's attention. The first is the area of diversity reform, an area, of course, not lacking in controversy. As you are aware, diversity cases regularly account for approximately 25 percent of civil filings, 40 percent of all civil trials, 60 percent of all civil jury trials and 15 percent of all appeals of district court decisions in the Federal courts. According to a recent study by the Federal Judicial Center, fully 192 district court judgeships, 22 appeals court judgeships and 144,000 juror days are directly attributable to existing Federal diversity jurisdiction. With very few exceptions, the Department of Justice continues to believe that returning diversity cases from the Federal system to the State systems would not only address a major cause of congestion in the Federal courts, but also serve to strengthen our Nation's system of judicial federalism.

We see no reason why the State courts would be inadequate or inappropriate forums for the vast majority of diversity cases currently being considered within the Federal judicial system. This is particularly true with the implementation in recent years of a number of initiatives, including, of course, the creation of the State Justice Institute, which have worked to strengthen State court institutions.

In the event that this subcommittee is not disposed to entirely abolish diversity jurisdiction, there are a variety of intermediate reforms that we would ask the committee to consider. These would range from those that would limit diversity to out-of-State parties; requiring a particularized showing of bias in diversity cases; redefining corporate citizenship to make diversity findings more difficult; excluding certain classes of cases, such as automobile accidents, entirely from Federal diversity jurisdiction; or requiring mandatory arbitration for diversity cases. At the very least, we would ask the subcommittee to consider raising the amount in controversy from the present $10,000 to some higher level. Rasing this figure even to $50,000 would be merely to account for the inflation that has occurred since 1985, when the current jurisdictional level was set.

Mr. Chairman, the second policy area that I would like to address relates to the Department's proposal for a meaningful judicial impact statement on the part of the Congress. As you know, a relatively substantial amount of litigation is generated by the failure of congressional statutes to address fundamental housekeeping questions dealing with the scope of their application. We believe that one painless method of court reform would be institutionalized procedures that would ensure that the Congress would not inadvertently leave important questions of statutory interpretation to the courts that could be easily addressed by the Congress itself.

Congressional efforts to avoid unnecessary statutory gaps could be enhanced through a reliance upon a checklist of questions that congressional committees would be required to ask themselves before reporting out legislative proposals. There would be no requirement that any particular changes be enacted in the proposal, merely that no accidental legislative oversights be made.

Among the questions that could be on this checklist are the following: One, is a statute of limitations intended in the bill? Two, does the bill apply retroactively? Three, if the bill provides for an award of attorney fees, does it specify the standards under which attorney fees are to be awarded? Four, is the bill designed to preempt State law provisions on similar subjects? Five, if the bill creates any new criminal offenses, does it define the requisite state of mind required to establish the offense? Six, is the bill intended to create private rights of action? Seven, to what extent is the bill to be considered severable in the event that some of its provisions later are found to be unconstitutional? Eight, if the bill contains administrative processes, to what extent must such processes be exhausted before seeking judicial review? Nine, does the proposed bill permit the arbitration of disputes? Ten, does the bill specifically define novel statutory terms. And eleven, does the bill require formal administrative proceedings consistent in every detail with the Administrative Procedure Act?

There may be other questions that ought to be routinely addressed, but we believe that, with very little expenditure of effort, the Congress could not only reassert its own principal role in deciding these and other housekeeping issues, but could unburden the Federal courts of the current and often difficult controversies relating to these kinds of statutory interpretation issues.

Mr. Chairman, again I appreciate the opportunity to be here this morning. My observations on diversity and the need for a serious form of judicial impact statement should not, of course, obscure the strong support that we have for S. 1482, and your efforts on behalf of that bill.

Senator HEFLIN. As you mentioned in your testimony, some of the pilot arbitration programs impose substantial liability upon parties who are dissatisfied with the results of the arbitration process and requests a trial de novo. You have indicated this may violate the seventh amendment. What modifications can be made in the pilot programs to overcome this possible constitutional challenge?

Mr. MARKMAN. We think you are raising exactly the right questions in talking about the seventh amendment. We do not think those constitutional issues are necessarily implicated in the idea of mandatory arbitration, but we do feel there should be an absence of further impediments to a trial de novo if an unsatisfied participant in arbitration decides to seek that trial de novo. It may be that he ought to be expected to pay the costs of arbitration, but we would like to see the opportunity for a trial de novo with a minimal number of barriers and impediments.

Senator HEFLIN. You also mention there are certain types of cases which should not be referred to arbitration, such as constitutional issues, more technical areas, such as tax cases. What other kinds of cases would you exclude from the arbitration process?

Mr. MARKMAN. Well, I would agree with Judges Hunter and Bilby that arbitration is a procedure that is principally beneficial when you are talking about difficult factual questions or recurrent factual questions that may arise in the course of litigation. We would be concerned about arbitration in the context of difficult constitutional issues and in tax cases. I think we would be reluctant to exclude other classes of cases, such as civil rights or labor controversies, although in a disproportionate number of those controversies I would expect that the constitutional issues or the complex questions of statutory interpretation might militate against arbitration.

Senator HEFLIN. While the Department of Justice supports the proposal to require appeals of habeas corpus petitions from Federal prisoners to be accompanied by a certificate of probable cause, the Department suggests that such certificate be issued only by an appellate judge. Why not allow the judge who issued the order to provide the certificate?

Mr. MARKMAN. That is certainly not an issue that would preclude our support of the bill, Senator. Our reason for preferring that the certification come from the appeals court is simply that the appellate judges, rather than the judge who make the initial decision, are in a better position to review that decision and to determine whether there is some realistic possibility of reversal that would warrant a certificate of probable cause. But we understand the current process for certifying probable cause has been working generally successfully with respect to State prisoners, and we would not oppose extending that system to Federal prisoners, whether or not it is amended as suggested.

Senator HEFLIN. Your testimony indicated there is some disagreement about the type of case that would fall in the category of the mass tort. Is it the Department's belief that we should experiment on a more limited basis and then possibly expand the Federal jurisdiction, or do cases beyond the airplane crash fall outside of this jurisdiction altogether?

Mr. **Markman**. Yes, sir, this would be the one area in which we would generally support a broadening of diversity jurisdiction. Obviously, we would favor a virtual abolition or repeal of diversity jurisdiction in this one largely for the reasons that Judges Hunter and Bilby recited. If that could be accomplished, we would favor some kind of mass tort diversity jurisdiction. We would be concerned that it be defined in a very precise way to make sure that we were limiting that jurisdiction to the kind of mass torts that Judges Hunter and Bilby were talking about, airplane incidents, catastrophes that took place in a single discreet incident at a single place at a single moment in time, as opposed to toxic torts or the kinds of problems we have seen in the asbestos litigation. Thus, we prefer to limit it to discreet controversies in which the entirety of the accident took place again in a single moment of time.

Senator **Heflin**. Your testimony discussed briefly the complex problems in mass tort cases when choosing the substantive law to be applied and it indicates the Department has recommended in the past that courts must generally apply the same substantive law in all apsects of the multiparty, multiforum litigation. How would a court make this determination?

Mr. **Markman**. Yes, I thought you asked some very good questions during the last panel. And there are some very difficult questions here. Generally, what we would like to see is the application of a single substantive law. And that single substantive law would apply both in terms of liability and in terms of damages. Determining that substantive law, obviously, can be done through a number of formulated approaches. Where the accident occurred, if you can determine that.

Our preferred approach, as we have set forth, is to consider a variety of factors, including where the accident took place, and on the basis of a consideration of the totality of circumstances decide what single law ought to apply. And, again, we believe that, except as specifically determined by the district court, that law would apply not ony for liability purposes, but also for purposes of damages and generally for the entirety of the suit.

Senator **Heflin**. The Office of Management and Budget has suggested that the State Justice Institute be funded by States, but is it not true the State courts implement and interpret Federal litigation, and by implementing programs that benefit the State courts, we in turn benefit our judicial system as a whole?

Mr. **Markman**. Well, you are certainly correct that State courts have a great deal of responsibility in interpreting the Federal Constitution and, indeed, we would like to restore a greater role for the States in that process. It is also true that the Office of Management and Budget has looked askance upon funding increases for the State Justice Institute. At the same time, the Attorney General has repeatedly been very outspoken in his support for the State Justice Institute. We think that the President has put some outstanding individuals on the State Justice Institute and we have tried to give it every possible encouragement that we can. Obviously, the questions of budgetary constraints are important ones and

OMB has had to work under some difficult constraints in determining how much money to apportion for the State Justice Institute.

Senator HEFLIN. Thank you. Senator Grassley is now absent. All right, thank you, Mr. Markman. There may be some questions that might be submitted in writing and we would appreciate your prompt reply.

Mr. MARKMAN. Thank you, Senator.

[The statement of Stephen J. Markman and responses to written questions follow:]

Department of Justice

TESTIMONY

OF

STEPHEN J. MARKMAN
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

SUBCOMMITTEE ON COURTS AND
ADMINISTRATIVE PRACTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

JUDICIAL BRANCH IMPROVEMENTS ACT OF 1987
S. 1482

MARCH 18, 1988

Mr. Chairman and members of the Subcommittee:

I am pleased to appear before you to present the views of the Department of Justice with respect to S. 1482, the "Judicial Branch Improvements Act of 1987." We commend the Chairman for introducing, and the subcommittee for holding hearings on this bill, which is sponsored by the Judicial Conference of the United States and includes numerous specific proposals intended to improve the administration of justice.

We support most of the provisions of S. 1482, although we believe that some provisions should be revised, and that other important judicial reforms, such as restricting or eliminating diversity jurisdiction, should be included as part of the bill. We will be pleased to work with you and your staff as the bill proceeds through this Congress.

I will address in order the six titles of the bill. I will also discuss some of the proposals not included in S. 1482 that are contained in H.R. 3152, the "Court Reform and Access to Justice Act of 1987", an omnibus court reform bill on which hearings were held last Fall in the House, as well as some other proposals supported by the Judicial Conference that are not found in either bill. I will then describe a new proposal by the Department of Justice to reduce the burdens on the courts in construing future Acts of Congress by focusing attention during the legislative process on a checklist of common issues as part of a "judicial impact" statement.

I. PROVISIONS OF S. 1482

A. Title I -- Mandatory Jurisdiction of the Supreme Court

Title I of the bill would virtually eliminate the mandatory jurisdiction of the Supreme Court (except for direct review of decisions by three-judge district courts) and substitute for it discretionary review by certiorari.

The Department has long supported making the Court's docket essentially discretionary[1] and does not object in general to title I.[2] However, we do oppose the elimination of discretionary direct appeals to the Supreme Court in government civil antitrust cases now authorized by the Expediting Act, 15 U.S.C. § 29. As amended in 1974, that Act authorizes direct appeals only if (1) the district court rules that "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice"; and (2) the Supreme Court "in its discretion" decides to hear the case by direct appeal, and the Court retains the right to remand to the appropriate court of appeals for review. Because the Court has discretion whether to hear the direct appeals, the appeals are not "mandatory," and thus do not raise the same concerns as the other statutes that would be amended by the bill. Since the revision of the Expediting Act in 1974, the Court has exercised its direct appeal authority only twice, both involving the government's antitrust suit against AT&T.[3] Although recourse to

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[1] See, e.g., Letter of Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, to Chairman Peter W. Rodino Concerning H.R. 1968, 98th Cong., 1st Sess. (Sept. 13, 1983); Statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, Concerning the Workload of the Supreme Court, Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, House Comm. on the Judiciary, 98th Cong., 1st Sess. 22-23 (Nov. 10, 1983).

[2] The Department's testimony concerning H.R. 3152, while noting our past support for legislation substantially curtailing the Supreme Court's mandatory appellate jurisdiction, suggested a more limited approach that would retain appellate jurisdiction in the few cases where a federal appeals court or the highest court of a state had held unconstitutional and Act of Congress on its face, or where a federal appeals court had held a state statute unconstitutional on its face. See Testimony of Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, Before the Subcomm. on Courts, Civil Liberties, and the (continued...)

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[2] (...continued)
Admin. of Justice, House Comm. on the Judiciary, at 8-9 (October 14, 1987). In a followup letter to Chairman Kastenmeier, we attached an analysis estimating that our proposal would eliminate 85% to 90% of the appeals that properly could be brought to the Supreme Court. See Letter from John R. Bolton, Assistant Attorney General, to Chairman Robert W. Kastenmeier, App. 1 (January 11, 1988). As stated in the letter, however, while we continue to believe that there is substantial merit to retaining certain narrowly crafted provisions for appeals to the Supreme Court, in view of the clearly stated preference of the Chief Justice, the Department would not object to the enactment of the broader provisions of this bill virtually eliminating the Supreme Court's appellate jurisdiction, leaving the Court's docket almost entirely discretionary.

[3] California v. United States, 464 U.S. 1013 (1983); Maryland v. United States, 460 U.S. 1001 (1983).

the Act in the future will likely be rare, the Act when used has worked well, and there is no reason to eliminate it.

B. Title II - Jury Selection and Service Amendments

The Department does not object to the provisions of this title, which revise some of the technical requirements regarding jury selection and grants the courts and Administrative Office of the United States Courts greater discretion in carrying out their jury selection duties.

C. Title III - Court-Annexed Arbitration

Title III authorizes the establishment, on an experimental basis, of court-annexed arbitration in each judicial district by local rule with the approval of the circuit's judicial council.

The Department has long supported efforts to experiment with greater use of alternative dispute resolution in appropriate cases. With respect to the court-annexed arbitration pilot programs, the Department adopted a policy statement in 1985, published at 28 C.F.R. § 50.20, concerning its participation in such programs. Based upon our experience, and with the reservations stated in that policy, we generally support going forward with the court-annexed arbitration experiment on a more uniform national basis.

On the other hand, we believe that Congress and the courts should move cautiously in this area, and that procedural safeguards and standards governing arbitration should be incorporated in legislation authorizing continuation and expansion of court-annexed arbitration experiments. For that reason the Department would support enacting the more structured court-annexed arbitration proposal contained in title III of H.R. 3152, with certain modifications, rather than the broader, less structured proposal in title III of S. 1482.

Title III of H.R. 3152 would establish a six-year experimental period of court-annexed arbitration in various federal district courts. Arbitration would be available by consent of the parties and the court could compel arbitration of cases involving only money damages not exceeding $100,000, including cases involving the federal government. Actions based on the alleged violation of rights secured by the Constitution (including actions brought under 42 U.S.C. § 1983 and so-called Bivens actions) and actions where jurisdiction is based on 28 U.S.C. § 1343 would not be eligible for referral to arbitration.

We strongly support the exclusion from arbitration under H.R. 3152 of constitutionally-based causes of action, inasmuch as arbitration is best suited for resolving simple factual issues, and not for resolving constitutional issues or other complex liability or legal issues.

As was reflected in the Department's above-referenced policy statement on court-annexed arbitration, we have been concerned about the provisions of some of the pilot programs that purport to impose substantial liability upon parties who are dissatisfied with the results of the arbitration process and request a trial de novo. We do not believe that parties who are required to participate in an arbitration program without their consent should be faced with the prospect of substantial penalties for seeking a trial de novo, a right, incidentally, that is mentioned in the Seventh Amendment to the Constitution. Thus, we support the provision in proposed 28 U.S.C. § 655(d)(2) under H.R. 3152 which would limit the penalties that may be imposed upon a party who had not consented to the arbitration.

We are also concerned about the treatment of preliminary dispositive motions under H.R. 3152. Proposed section 653(b) provides that arbitration hearings under the bill must begin no later that the later of (1) 180 days after the answer is filed or (2) 30 days after the court disposes of any motion to dismiss or motion for judgment on the pleadings or for summary judgment. This appears to contemplate that the court will act on dispositive motions before arbitration begins, but does not require arbitration to be deferred in the meantime.

The whole point of permitting dispositive motions, however, is to save the parties the time and expense of an unnecessary trial. Allowing arbitration to go forward while such motions remain pending could lead to as much waste as allowing a trial to go forward in that circumstance. We would recommend, accordingly, that the bill prohibit the commencement of arbitration (in the absence of both parties' consent) until the court has acted on any dispositive motions.

Finally, we also have some concerns about the effectiveness of the pilot arbitration programs in certain types of cases involving the United States.[4/] We read proposed 28 U.S.C. § 651(a) as authorizing the district courts to provide by rule that certain kinds of cases are not to be referred to arbitration, and we would expect to work with the various district courts that adopt arbitration programs to craft the

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[4/] For example, the Department's experience with the arbitration of tax cases has led to relatively few settlements on the terms proposed by arbitrators and almost all such cases have gone on to trial de novo, either on the application of the taxpayer or of the United States. This has led to wasteful and unproductive duplication of effort, increasing the burden of litigating tax cases by requiring that they be tried twice. That experience strongly suggests that such cases are not of a kind that lends itself to economical and efficient arbitration, which should be the touchstone in determining which cases to refer to arbitration.

categories of eligible cases in the most appropriate way, so as to include the types of cases most appropriate for arbitration and to exclude other kinds of cases that, for various reasons, do not lend themselves to economical resolution in the arbitration process.

In order to further the objective of focusing court-annexed arbitration on those kinds of cases for which it is most suited, we would suggest that proposed 28 U.S.C. § 652(c), as added by Section 301 of H.R. 3152, be amended to track more closely the Department's policy statement on arbitration, 28 C.F.R. § 50.20(b)(5). Section 652(c) should be amended to read substantially as follows:

> (c) A district court shall establish by local rule procedures for exempting cases from arbitration, sua sponte or on motion of a party, in which the objectives of arbitration would not appear to be realized, because the case involves complex or novel legal issues, or because legal issues predominate over factual issues, or for other good cause.

D. Title IV -- District Court Executive

E. Title V -- Federal Judicial Center Amendments

The Department takes no position with respect to title IV, concerning district court executives, or title V, concerning Federal Judicial Center Amendments.

F. Title VI -- Miscellaneous Provisions

The Department does not oppose the following provisions of title VI:

- -- Section 601 (repealing 28 U.S.C. § 1393, which provides for divisional venue);
- -- Section 604 (exempting bankruptcy judges, magistrates, and law clerks from Federal Leave Act);
- -- Section 606 (military retirement pay for senior or retired judges);
- -- Section 609 (amendments to conform 28 U.S.C. §§ 611 & 627 to FERS);
- -- Section 612 (circuit judicial conference amendments);
- -- Section 613 (authorizing incentive awards);
- -- Section 616 (governing appeals of arbitration orders);
- -- Section 617 (salaries in the Administrative office);
- -- Section 618 (court security amendments);
- -- Section 619 (travel reimbursement);
- -- Section 620(a) (eliminating, after 1989, the reports required of the Administrative Office, under the Financial Institutions Regulatory and Interest Act Control Rate of 1978);
- -- Section 621 (transferring certain responsibilities relating to the D.C. Public Defender from the Administrative Office to the Board of Trustees of the D.C. Public Defender Service); and

-- Section 622 (increasing Claims Court filing fee to $120).

The Department has the following comments regarding other provisions of title VI.

1. Registration of Foreign Judgments (Section 602)

Section 1963 of Title 28 currently permits registration of a judgment in another district court only after the time for appeals has run or any appeal is final. Section 904 of the bill would permit a judgment to be entered in another district pending appeal, but it would be necessary to secure an order from the court in which the judgment was entered upon a showing of cause. Additionally, the bill would merge the provisions of 28 U.S.C. § 1963A (relating to judgments of the Court of International Trade) into § 1963.

The Department supports the proposal, but would suggest that it does not go far enough. It makes little sense for the right of a federal judgment creditor to obtain a lien on the property of judgment debtor to depend on the happenstance of the property's location, especially in areas like Washington, D.C., where a debtor may own property in one or more nearby jurisdictions. We suggest that a judgment creditor should not be required to seek a court order for cause in order to register a judgment, pending appeal, in another district. The more appropriate approach is that followed under 28 U.S.C. § 2508 with respect to the Claims Court. That section permits judgments of that court on a counterclaim by the United States to be registered in any district court without regard to whether the judgment is subject to appeal, and without any requirement of special court permission.

2. Diversity in Cases Involving Representative Parties (Section 603)

The Department supports this proposal to deem, for the purpose of determining whether diversity jurisdiction exists under 28 U.S.C. § 1332, the legal representative of an infant or an incompetent, or of the estate of a decedent, to be a citizen of the same state as the infant, incompetent, or decedent. In addition, and as I will explain later, the Department would recommend further restrictions on, or the total abolition of, diversity jurisdiction.

3. Habeas Corpus (Sections 607 and 608)

Section 607 would extend to 28 U.S.C. § 2255, governing appeals from district court decisions on habeas corpus petitions of federal prisoners, the certificate of probable cause requirement that currently applies to state prisoners under 28 U.S.C. § 2253. Under § 2253, an appeal may not be taken from a final order in a habeas corpus proceeding "unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." While we support extending the certificate requirement to habeas corpus proceedings involving federal prisoners, we urge that, in both §§ 2253 and 2255, the probable cause determination be required to be made exclusively by an appellate judge.

We also support section 608, which would expressly permit the district court to deny frivolous habeas corpus petitions on the merits, even if the applicant has failed to exhaust state remedies. This revision should result in substantial time savings in both the federal and state judicial systems without impairing the federalism interests in requiring exhaustion.

I also would like to take this opportunity to urge as well that the Subcommittee turn its attention to a broader range of habeas corpus reforms that are necessary to respond to identified concerns. The Department of Justice has long supported enactment of responsible habeas corpus reform measures. As you know, a bill containing such habeas corpus reforms, including the two discussed above, passed the Senate in 1984 by a vote of 67-9.[5/] We continue to support those reforms,

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[5/] See S. Rep. No. 226, 98th Cong., 1st Sess. 18-19 (1983); Habeas Corpus Reform: Hearing Before the Senate Comm. on the Judiciary on S. 238, 99th Cong., 1st Sess. 21 (1985).

which are contained in title II of S. 1970, the Criminal Justice Reform Act of 1987, which is before the full Committee.

4. Judicial Disqualification (Section 610)

Section 610 would amend the judicial disqualification standards of 28 U.S.C. § 455 to permit a judge to continue to sit in a case in which he or she had a financial interest (other than an interest that would be substantially affected by the outcome) and in which he or she has devoted substantial judicial time if either (1) all parties consent, or (2) the judge determines that the public interest in avoiding the cost of delay or reassignment outweighs the appearance of impropriety in his or her continuing with the case. While we have some sympathy for the purposes of the proposal, we have some practical concerns about the workability of these amendments.

We are concerned that authorizing waiver of disqualification by consent might allow courts to attempt to pressure the parties to consent, or might put litigants in an awkward position. With respect to permitting judges to engage in a case-by-case balancing test to determine whether to continue to hear the case, we are concerned that this would leave much to the potentially disparate judgments of individual judges, who would be engaged in self-judgment in balancing their own potential or apparent partiality against competing considerations of efficiency.

The Department's position on the question of judicial disqualification was set forth at greater length in a letter in 1985.[6] Our 1985 letter suggested two approaches to resolving the disqualification problem when, following a substantial investment of a judge's time in a case, the judge is discovered unexpectedly to have a disqualifying financial interest involved in the case. Both alternatives would apply only if the financial interest is not an interest that could be substantially affected by the outcome of the proceeding.

One alternative would be to permit the judge to divest himself or herself of the disqualifying financial interest.[7] If this is not feasible, the judge, in addition to conducting the balancing test described in S. 1482, would be required to obtain a waiver of disqualification from a designated, disinterested authority, such as his or her chief judge.[8] This is similar to the approach followed under 18 U.S.C. § 208 with respect to the disqualification of executive officials and, by requiring a waiver from a disinterested third party, would avoid the self-judgment aspects of the S. 1482 proposal.

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[6] Federal Judicial Improvements -- 1985, Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, House Comm. on the Judiciary, 99th Cong., 1st Sess. 113-17 (1985) (letter from James M. Spears, Acting Assistant Attorney General, Office of Legal Policy, to Chairman Robert W. Kastenmeier, concerning H.R. 3049, H.R. 2446, H.R. 2561, and H.R. 3044).

[7] Id. at 114.

[8] Id. at 116-18.

5. Territorial Courts (Section 611)

The Department does not oppose in concept section 611, which would allow the assignment of Ninth Circuit judges to serve temporarily as judges for the Marshall Islands, the Federal States of Micronesia, or Palau. Article I, Section 9 of the Constitution provides that "no person holding any Office of Profit or Trust" of the United States "shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." Section 611 would provide such congressional consent for U.S. judges to serve temporarily as judges for these jurisdictions. We would recommend, however, that if Congress enacts this provision, the bill clarify that Congress' consent extends to the service of clerical employees and law clerks who may be required to accompany the judges, and to the reimbursement by those countries of the travel and other necessary expenses for the judges, clerical employees, and law clerks.

6. Judicial Immunity (Section 614)

The Department's views on the judicial immunity proposal contained in section 614 were explained at some length in the testimony of Kevin R. Jones, Deputy Assistant Attorney General, Office of Legal Policy, before this Subcommittee on February 26, 1988.

7. Waiver of Overpayment Claims (Section 615)

The Department does not object, in concept, to section 615, authorizing the waiver of claims for overpayment of salary or certain other allowances to employees of the Administrative Office, the Federal Judicial Center, and the courts. Section 615 would accomplish this by amending 5 U.S.C. § 5584 to include those entities within the definition of "agency", with the Director of the Administrative Office deemed the "agency head". Section 5584 allows an agency head to waive certain overpayment claims of up to $500, but requires waivers of larger claims to be made by the Comptroller General. Inasmuch as the role of the Comptroller General here appears to be of dubious constitutionality under Bowsher v. Synar, 106 S. Ct. 3181 (1986), we suggest that, instead, the waiver authority be granted the Director of the Administrative Office under the Federal Claims

Collection Act, [9] or that the $500 limit of section 5584 be lifted.

8. Equal Access to Justice Act Reports (Section 620(b))

Section 620(b) would transfer the responsibility for reporting fees and expenses under the Equal Access to Justice Act from the Administrative Office of the United States Courts to the Attorney General. The Department, however, does not have ready access to that information, inasmuch as certain other agencies have independent litigating authority and, in any event, the departments and agencies involved in EAJA litigation may be held directly liable for such fees and expenses under the Act. Collecting this information would be an enormous undertaking. We think that the Administrative Office, with its direct access to data from the courts, continues to be the most logical entity to collect and report this information.

9. Abolition of the Temporary Emergency Court of Appeals (Section 623)

Section 623 would abolish the Temporary Emergency Court of Appeals ("TECA"), effective October 1, 1988, and transfer all cases that may arise within its jurisdiction either to the regional courts of appeals or to the Federal Circuit.

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[9] 31 U.S.C. § 3701 et seq. (allowing agency head waivers of up to $20,000 without Comptroller General approval).

While the Department does not oppose outright the abolition of TECA, we believe that there may be at least some question whether the small savings that may result would offset the cost and administrative burden associated with transferring its caseload to other courts. This is particularly so if all appeals already assigned to a panel of TECA judges are to remain with the same judges.

If TECA is to be abolished, we believe that it would be preferable to transfer its work to the Federal Circuit, rather than dividing it among the regional courts of appeals. TECA was established to centralize cases in one court for consistency and expertise, and dividing its relatively small caseload up now among the regional courts of appeals, when those courts have not handled such cases for sixteen years, would seem to defeat at one stroke all of the reasons for creating TECA. Not only would judges in several different courts of appeals have to take the time to familiarize themselves with the relatively specialized subject matter of TECA cases, but such bifurcation of appellate jurisdiction would create the most unfortunate possibility, after many years of centralized appellate jurisdiction, of needless splits among the courts of appeals with respect to the handful of cases yet to be decided. If TECA is abolished, it would be far more logical to transfer those cases to the United States Court of Appeals for the Federal Circuit, because of that court's experience in complex cases and its relatively light caseload, and to ensure a consistent appellate disposition of the remaining cases within TECA's jurisdiction.

II. PROVISIONS OF H.R. 3152

There are at least three additional issues addressed in H.R. 3152 that we believe should also be addressed in S. 1482: (1) diversity reforms, (2) establishment of limited jurisdiction for certain mass tort claims, and (3) clarification of the jurisdiction of the Federal Circuit.

A. Diversity Reforms

The Department continues to urge that diversity jurisdiction be entirely eliminated or substantially restricted to reduce court congestion. In recent years, diversity cases have generally accounted for about 25 percent of all civil filings, 40 percent of all civil trials, 60 percent of all civil jury trials, and 15 percent of all appeals of district court decisions in the federal courts.

Title IV of H.R. 3152, while not eliminating diversity, contains two useful diversity reforms that should be included in

S. 1482: (1) it would increase the jurisdictional amount for diversity cases from the present $10,000 to $50,000; and (2) it would expand the concept of citizenship of corporations so as to virtually eliminate diversity of citizenship jurisdiction for corporations.

We think raising the jurisdictional amount to $50,000 would be a useful first step in reforming diversity jurisdiction, although it would have only a limited effect in stemming the tide of diversity filings in the federal courts. Its principal effect would be simply to account for inflation since 1958 when the current $10,000 jurisdictional minimum was set.

We also support the general concept of expanding the definition of corporate citizenship, as proposed in section 412 of H.R. 3152.[10/] We are concerned, however, that the "doing business" standard proposed by that bill would be unworkable and inappropriate. We believe that such a standard might unnecessarily introduce into the determination of subject-matter jurisdiction the complicated standards governing the availability of *in personam* jurisdiction; a corporation might well be deemed to be "doing business" in a state in which it has never conducted

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[10/] *See Intercircuit Panel of the United States Act, Hearing on S. 704 Before the Subcomm. on Courts, Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 19-20 (1985) (statement of James M. Spears, Acting Assistant Attorney General, Office of Legal Policy) [hereinafter "1985 Senate Testimony"].

any local business operations.[11] That would simply be an open invitation to a morass of new litigation over the factual predicates to a determination that a corporation is "doing business" in a particular state; moreover, because jurisdictional defects cannot be waived and can be raised at any stage of judicial proceedings, even on appeal,[12] such a vague standard could have quite unintended and inappropriate destabilizing consequences. It would be far preferable to establish a more easily administered, objective standard, such as whether the corporation is registered or otherwise licensed to do business within a state. That is the standard previously suggested by the

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[11] The due process clause limitations on in personam jurisdiction (whether jurisdiction is premised on a "doing business," "stream of commerce," or other standard) were set forth in International Shoe Co. v. Washington, 326 U.S. 310 (1945). The difficulties and unpredictability in applying the "minimum contacts" and "traditional notions of fair play and substantial justice" standards there set forth were illustrated last Term by Asahi Metal Industry Co. v. Superior Court of California, 107 S. Ct. 1026 (1987), in which a seriously divided Court differed over the rationale for holding that, under International Shoe, a Japanese manufacturer selling tire valve assemblies to a Taiwanese manufacturer selling tires for use throughout the world could not, on that basis alone, constitutionally be subject to California jurisdiction. See also Calder v. Jones, 465 U.S. 783 (1984) (Florida reporter and editor for magazine with large California circulation may constitutionally be subject to libel suit in California with respect to an article concerning the California activities of a California resident); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) (Ohio magazine publisher may be subject to New Hampshire jurisdiction for libel claim because of New Hampshire sales of 10,000 to 15,000 copies of its magazine each month).

[12] See, e.g., McGrath v. Kristensen, 340 U.S. 162, 167 (1950); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 474 (D.C. Cir. 1976).

Department, and appears to be the standard contemplated by Judge Joiner as well in an article on the subject, although portions of his discussion are ambiguous.[13/]

We continue to urge that other diversity reform proposals be considered such as the elimination of diversity jurisdiction for in-state plaintiffs and the elimination of diversity jurisdiction for automobile accident cases.[14/] Such changes would eliminate the burden on federal courts to handle such cases as to which there is no reason why the state courts would be inadequate or inappropriate.

B. Multi-Party, Multi-Forum Litigation

Subtitle A of title IV of H.R. 3152 would establish a basis for new subject-matter jurisdiction regarding multi-party

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[13/] See Joiner, Corporations as Citizens of Every State Where They Do Business: A Needed Change in Diversity Jurisdiction, 70 Judicature 291, 292 (1987) (referring to "a corporation having registered with state authorities within a state" and arguing that "This bright line of registration captures only those which have, of their own free choice, chosen to use a state for their economic benefit. No corporation would become a state citizen by accident").

[14/] See Letter from Robert A. McConnell, Assistant Attorney General, to Chairman Robert W. Kastenmeier, re H.R. 3689, H.R. 3690, H.R. 3691, H.R. 3692, and H.R. 3693 (June 11, 1984), at 18-20 [hereinafter "1984 Letter"] (in-state plaintiffs); 1985 Senate Testimony at 75-76 (supporting increase in jurisdictional amount as well as elimination of in-state plaintiffs and auto accident cases, and restriction of diversity cases involving corporations by expanding corporate citizenship).

and multi-forum litigation. Proposals for such a specialized basis of jurisdiction date back to a somewhat similar proposal made by the Department of Justice in 1979,[15] and the Department submitted extensive comments on a later proposal considered by Chairman Kastenmeier's Subcommittee in the House in 1984.[16]

As an isolated matter, creation of a new basis of federal jurisdiction for mass tort cases could well be criticized for adding to the judicial workload. Accordingly, the Department's support for such an expansion of federal jurisdiction has in the past been tied to a corresponding, significant reduction in the present scope of diversity jurisdiction in other cases. We continue to believe that consideration of a new mass tort jurisdiction should be done only in the context of other, substantial reductions in diversity jurisdiction, which would assist in limiting the availability of such jurisdiction to those in which a legitimate need for such special jurisdiction has been shown.

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[15] See Diversity of Citizenship Jurisdiction/Magistrates Reform - 1979: Hearings on H.R. 1046 and H.R. 2202 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. of the Judiciary, 96th Cong., 1st Sess. 157-62 (1979).

[16] See 1984 Letter at 3-12. See also Diversity of Citizenship Jurisdiction - 1982: Hearing on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice, House Comm. on the Judiciary, 97th Cong., 2d Sess. 7-16 (1982) (testimony and supplementary submission of Assistant Attorney General Jonathan C. Rose).

With respect to the form that any special mass tort jurisdiction should take, we would oppose the proposal as drafted in H.R. 3152, which departs in significant respects from prior bills. In particular, that proposal includes provisions evidently designed to include within the new jurisdiction far more cases than would relate specifically to the previously-understood mass tort cases. We cannot support such a substantial extension of the scope of the new jurisdictional provisions. The following basic modifications would be required before the Department could support the proposal (contingent on an accompanying substantial reduction in diversity jurisdiction).

a. Proposed § 1367(a) under H.R. 3152 refers to civil actions resulting from "the same transaction, occurrence, or series of related transactions or occurrences." As the Department's position in the past had contemplated, the purpose of establishing multi-party, multi-forum jurisdiction was to deal with mass injury cases arising from discrete, spatially and temporally limited incidents, such as an airplane crash or hotel fire. The number of such mass disaster cases is quite limited; admitting them to the federal courts on a "minimum diversity" basis should create no excessive burden if other diversity jurisdiction is reduced at the same time.17/

17/ See 1984 Letter at 6-7.

By contrast, the phrase "series of related transactions or occurrences" suggests that other major classes of mass injury cases arising from more diffuse patterns of actions or occurrences, such as the ongoing asbestos litigation, may fit within this new type of federal jurisdiction. These types of cases would present a far different set of concerns in the federal courts, and it is far from clear that the best way to deal with such disparate types of cases would be the same as would be appropriate for a single mass tort such as an airplane crash. Moreover, the impact of including this type of case on the federal court workload is entirely speculative at this point, although one can certainly imagine that it would be quite substantial. For example, the provisions of proposed 28 U.S.C. § 1367, by allowing five plaintiffs to establish multiparty, multiforum jurisdiction in many cases and allowing any other potential plaintiffs to intervene even if they otherwise would not have any basis to invoke federal jurisdiction, would fairly invite the filing in federal court of large numbers of class-action suits currently handled at the state level, potentially overburdening the federal courts.

Accordingly, we strongly recommend that the words "series of related transactions or occurrences" (and perhaps "transaction" as well) be deleted from this portion of the H.R. 3152 proposal, in order that the bill be limited to the traditional concept of mass torts involving a single "event or occurrence".

b. Proposed § 1367(b) would limit jurisdiction to those actions involving claims "for personal injury or injury to property." It would be desirable to clarify here or elsewhere in the bill that personal injury means physical harm to individuals (including death) and that injury to property means physical damage to, or destruction of, tangible property. This would be consistent with the proposal's purpose to deal with mass injury cases, and foreclose interpretive litigation over the adequacy of intangible "injury" as a basis for jurisdiction, such as financial loss or harm involved in fraud or breach of contract cases. Other federal laws -- such as the antitrust and securities laws -- already provide a basis for suit with respect to many kinds of commercial wrongs that may result in financial harm to a large number of persons in different states.

c. Under currently popular choice of law theories, the law of different jurisdictions may be applied to different parties in the same case, or to various elements of a single party's case, on account of differences in domiciles, the places where the alleged tortious actions took place, and the like. This fragmentation of substantive law has given rise to choice of law litigation of staggering complexity; delay in settlements resulting from uncertainty over the state law to be applied; an impetus toward forum shopping; and a perceived unfairness when different bodies of law are applied to different parties in the same case.[18]

Proposed § 1658 would not apply normal choice of law rules to suits brought in the federal courts under the new multi-party, multi-forum jurisdiction, but would leave to the courts to determine "the source or sources of applicable substantive law." This, unfortunately, leaves open the possibility that courts would continue to apply differing state substantive law to different parties or aspects of claims in the same action.

To avoid this undue complexity and other untoward results described above, the Department recommended in 1984 that a mass tort proposal provide that the courts must generally apply the same substantive law in all aspects of the multi-party, multi-forum litigation, and that on remand to other federal or state courts for calculation of damages, those courts would also be bound by the same substantive law that has been chosen for application. This approach would not eliminate the need for a choice of law determination, but only one choice would be required.

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[18] See, e.g., In re Air Crash Disaster Near Chicago, 644 F.2d 594 (7th Cir. 1981). This point is discussed at greater length in the 1984 Letter at 9-12.

The Department is continuing to review these issues and may soon provide the subcommittee with a proposed revision of subtitle A of title IV of H.R. 3152.

C. Jurisdiction of the Federal Circuit

Section 704 of H.R. 3152 would address the Federal Circuit's jurisdiction by amending 28 U.S.C. § 1295(a)(2) to provide that all appeals from the district courts in which the court's jurisdiction rests, in whole or in part, on specified provisions of 28 U.S.C. § 1346, would go to the regional courts of appeals rather than to the Federal Circuit. This provision is designed to overturn the Supreme Court's recent decision in United States v. Hohri, 107 S. Ct. 2246 (1987), which held that jurisdiction of appeals from cases which arise under both the little Tucker Act, 28 U.S.C. § 1346(a)(2), and the Federal Tort Claims Act, 28 U.S.C. § 1346(b), must go to the Federal Circuit rather than to the regional courts of appeals. The new provision would vest appellate jurisdiction in the Federal Circuit when the district court's jurisdiction is based solely on the little Tucker Act, but would vest jurisdiction in the regional courts of appeals when the district court's jurisdiction is based in part on the little Tucker Act and in part on the Tort Claims Act (or other provision of § 1346).

While we believe that § 1295(a)(2) ought to be revised, we are not persuaded that the amendment proposed in H.R. 3152 resolves the problems in its current formulation. As I stated in an appendix to my testimony on H.R. 3152, section 704 of H.R. 3152, which would overrule United States v. Hohri, 107 S. Ct. 2246 (1987), would be inconsistent with the purpose of the Federal Courts Improvement Act ("FCIA") to centralize in the Federal Circuit appellate jurisdiction over Tucker Act cases. Moreover, this revision would not reduce the amount of litigation on the scope of the Federal Circuit's jurisdiction over district court judgments.

The Department's lawyers have spent (and continue to spend) hundreds of frustrating and unproductive hours litigating the meaning of section 1295(a)(2) and the scope of the Federal Circuit's jurisdiction over district court judgments. Countless hours are expended briefing and arguing such issues as whether a case is a Tucker Act case, whether it is a little Tucker Act case, or whether a regional circuit has any role in a case with a lurking Tucker Act issue. A good example of this problem is McMahon v. Bowen (Fed. Cir. No. 87-1228; 9th Cir. No. 87-1745). In that case we filed an appeal to the Federal Circuit from a district court judgment that we contend erroneously exceeded the Tucker Act jurisdiction of the district courts. (The amount in controversy exceeds the $10,000 limit on district court little Tucker Act jurisdiction.) We appealed the case to the Federal

Circuit because, in our view, Sec. 1295(a)(2) was intended to channel into the Federal Circuit such basic questions as whether a case is a Tucker Act case, and whether the district court exceeded its Tucker Act jurisdiction. Because the statute is admittedly unclear as to where the appeal should lie, we also filed a protective appeal to the regional circuit, asking the latter court to hold the appeal in abeyance while the Federal Circuit resolved the threshold question of where the appeal lies. The regional circuit has declined to stay its hand, and both appeals from the same district court judgment have proceeded at the same time. We have spent most of our time in both courts trying to explain the jurisdictional quagmire presented, with the merits virtually eclipsed in the process. It seems apparent that government attorney time, and judicial time, could be much better spent. The experience in McMahon and in several other cases demonstrates precious resources are squandered on these matters having little intrinsic value either to the government, the courts, or anyone else.

While, for these reasons, we do not doubt that section 1295 needs major legislative attention, the proposed amendment in H.R. 3152 does not resolve these present difficulties. It continues to divide the jurisdictions of the appellate courts depending on the nature of the underlying claims. Countless hours of time would continue to be spent under the revised statute on such jurisdictional issues as whether the case is based solely on the little Tucker Act, or whether another basis of jurisdiction under section 1346 is involved.

The Department expects to forward shortly proposed amendments to the FCIA that would provide for uniformity and expedition in determining which court has jurisdiction, but would not adjust the statutory line dividing the jurisdictions of the Federal Circuit and the regional circuits.

III. OTHER JUDICIAL CONFERENCE RECOMMENDATIONS

The testimony of Judges Hunter and Bilby on behalf of the Judicial Conference discusses several recommendations of the Judicial Conference that are not included in S. 1482. While the Department has not had an opportunity to reach a position on all of them, I can state that the Department supports the Judicial Conference's proposal, as described in the testimony of Judges Hunter and Bilby, concerning corporate venue, and does not oppose its proposals concerning repeal of the Enelow-Ettelson doctrine, the location of the chambers of circuit judges, and the elimination of the Board of Certification for Circuit Executives. We also would not object to the proposed amendments to removal procedures, except for the proposal to permit removal at the behest of any one defendant, even if the other defendants do not wish to remove. This would add more cases to an already overburdened federal judiciary that the state courts are perfectly adequate to handle.

IV. CONGRESSIONAL ANALYSIS OF THE JUDICIAL IMPACT OF LEGISLATION

In addition to matters such as those discussed above, the Department of Justice has focused some attention on the possibilities for reducing litigation over statutory enactments by helping to improve the process by which such legislation is drafted and considered.

A substantial amount of litigation is generated by the failure of some statutes to address fundamental "housekeeping" questions dealing with the scope of their application. Some federal enactments fail to contain statutes of limitations, definitions of certain ambiguous terms, clauses addressing the existence of federal preemption, and other provisions that are vital to a full understanding of a statute's effects and "reach." We believe that the institution of legislative procedures aimed at preventing these "statutory gaps" in new statutes may constitute a relatively painless means of court reform -- a method directed at eliminating some of the conditions that give rise to the costly litigation that crowds judicial dockets.19/

19/ Our consideration of this avenue of court reform was sparked by comments made by Judge Jon O. Newman of the Second Circuit at the Seminar on the Administration of Justice last April in Charlottesville.

Such statutory gaps have most unfortunate consequences. Litigation inevitably is generated by ambiguities regarding the ambit of new statutory requirements. Resources devoted to litigation that could have been avoided through artfully crafted legislative provisions represent a pure social waste. Additional social losses stem from the contribution of such unnecessary litigation to the problems of court crowding and delay that afflict the judicial system. These losses may be magnified (and the period of "statutory uncertainty" may be protracted) to the extent different courts reach inconsistent or ambiguous results when "filling in" particular legislative gaps. Statutory ambiguities also impose costs on private individuals whose interests are affected by new legislation. Uncertainty about statutory rights and duties -- and the cost of litigation aimed at resolving statutory ambiguities -- may diminish the welfare of those individuals by discouraging them from pursuing desired courses of action. Finally, to the extent major interstitial statutory gaps are filled in by unelected judges, rather than by the people's elected representatives, our system of government is undermined. Federal judges should not be assigned the essentially legislative task of creating substantive interstitial rules that effectively add provisions to a statute. The separation of powers is undermined if Congress leaves it to the judiciary to "complete" newly passed laws.

Some may argue that such statutory questions can be dealt with through appropriate committee report language. Such a "legislative history fix" should, however, be avoided. As a practical matter, courts consider legislative history only when statutory language is ambiguous -- and not all courts may view statutory gaps as sources of ambiguity. Even if legislative history is considered, minority views in committee reports or statements made during floor debate may substantially undermine the weight given to committee report provisions. More fundamentally, committee report language is not voted on by the Congress and does not necessarily reflect its will. Article I, section 7 of the Constitution requires that all legislation be passed by both houses of the Congress and presented to the President. It would be inconsistent with this constitutional scheme for Congress knowingly to leave gaps and attempt to legislate through committee reports, rather than including the substantive provisions in the bill itself. It would be difficult to square calculated attempts to legislate through committee reports with the requirements of INS v. Chadha, [20/] which held that Congress cannot act by vote of an entire house, much less a single committee. For all of these reasons, Congress should be careful to express its will in statutory language, rather than by trying to fill statutory gaps through mere legislative report language.

[20/] 462 U.S. 919 (1983).

Congressional efforts to avoid unnecessary statutory gaps could be enhanced through reliance on a "checklist" of "statutory housekeeping" provisions. Such a standardized checklist would set forth basic questions bearing on the scope of application of a new proposed statute -- questions such as the statute of limitations, the definition of key statutory terms, the extent of federal preemption, the existence of a private right of action, and so forth. The appropriate congressional drafting committee (or committees) could consult this checklist, in order to ensure that draft legislation did not include significant and avoidable gaps or ambiguities. While adherence to a checklist would not eliminate unavoidable difficulties in statutory interpretation, it would at least help minimize unnecessary litigation over matters that could readily have been addressed by Congress.

I am attaching to this testimony a paper my office prepared more fully fleshing out this concept. As stated in the paper, we think that a checklist of questions to be considered in enacting each piece of legislation could include at least the following questions: (1) does the proposed law contain a civil statute of limitations?; (2) does the proposed law apply retroactively to pending matters?; (3) if the proposed law provides for an award of attorneys' fees, does it contain a provision clearly specifying the terms under which an attorneys' fee can be awarded?; (4) does the proposed law contain a clear preemption provision?; (5) does the proposed law explicate the state of mind required to establish a criminal offense?; (6) does the proposed law grant private parties a right to sue?; (7) does the proposed law contain a "constitutional severability" provision?; (8) does the proposed law require that administrative remedies be exhausted?; (9) does the proposed law set forth the standards governing the assertion of personal jurisdiction?; (10) does the proposed law permit the arbitration of disputes?; (11) does the proposed law specifically define key statutory terms?; and (12) does the proposed law require formal administrative proceedings?

We believe that to the degree Congress regularly focuses on and attempts to answer these questions in the legislative process, much unproductive and fruitless litigation can be avoided in the future. For this reason, we would suggest that the House and Senate consider the appropriateness of adopting procedures to ensure that each committee, during its consideration and markup of a bill, has consulted a checklist embodying fundamental questions such as those set forth above and has given them due consideration.

* * *

In conclusion, Mr. Chairman, I appreciate the opportunity to appear before you today to discuss the

Department's position on S. 1482 and related court reform proposals. The Department of Justice believes that the various parties interested in court reform should be able to reach ready agreement on a large number of the issues discussed in my statement today, and that the bill before you today can serve as the basis of a significant and meritorious court reform consensus bill that can be enacted in this session of Congress.

Thank you very much. I would be pleased to answer any questions.

ATTACHMENT
U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

LEGAL IMPACT STATEMENT: ONE

PROPOSAL FOR PAINLESS COURT REFORM

December 1987

LEGAL IMPACT STATEMENT: ONE PROPOSAL FOR PAINLESS COURT REFORM

I. INTRODUCTION

Many federal statutes do not contain provisions addressing fundamental "housekeeping" questions bearing on the scope of statutory application: questions such as the definitions of key terms, the existence of private rights of action, the extent of state law preemption, and the existence of statutes of limitation, to name just a few. Such statutory gaps may spawn costly litigation, aimed at resolving ambiguities that could have been answered definitively in the legislative drafting process. Litigation that could have been avoided through careful drafting wastes resources; further strains the overcrowded federal judicial system; imposes costly uncertainty on private actors affected by the legislation in question; and places key legislative policy decisions in the hands of unelected judges, rather than in the hands of the people's elected representatives. The problem of uncertainty may be magnified, to the extent different courts reach inconsistent or ambiguous results in the process of "filling in" a particular "statutory gap." In short, uncertainty concerning the scope of statutory interpretation in effect transfers some legislative authority from Congress -- where it properly belongs -- to the judiciary.

It might appear that questions bearing on the scope of statutory application might be dealt with through appropriate committee report language. Such a "legislative history fix" would, however, prove inadequate. Committee report language need only be consulted when statutory language is ambiguous -- and not all courts may view statutory gaps as sources of ambiguity. Furthermore, committee report language does not necessarily reflect the will of the entire Congress. Minority views in committee reports or statements made during floor debate may substantially undermine the weight of committee report provisions. Finally, some committee report language may itself give rise to ambiguity. For all of these reasons, statutory gaps cannot adequately be dealt with through mere legislative report language.

This memorandum proposes that to ameliorate this "statutory gap" problem, Congress could develop and use a "checklist" of "housekeeping" items bearing on the scope of statutory application.1/ Such a checklist would constitute a true

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1/ Development of such a checklist was suggested in informal remarks made by Second Circuit Court of Appeals Judge Jon O. Newman in April 1987 at the Seminar on the Administration of Justice (sponsored by the Brookings Institution) in Charlottesville, Virginia.

"judicial impact" statement -- one with teeth to it.[2] Whenever feasible, the appropriate congressional drafting committee should seek to craft statutory provisions aimed at addressing the matters identified in the checklist. Possible items that might comprise this checklist are briefly discussed. This memorandum closes by recommending that the "housekeeping checklist" requirement be embodied in proposed House and Senate rules. These procedures should then require the reporting committee (or committees) to certify that all the items on the "housekeeping checklist" have been given due consideration (whether or not actual statutory language satisfying all of the checklist items is included in the bill). The compliance with this rule would constitute a "legal impact" statement.

II. CHECKLIST OF ITEMS TO BE ADDRESSED IN FEDERAL STATUTES

A. Overview

A substantial amount of litigation is generated by Congress' failure to address fundamental "housekeeping" questions dealing with the scope of application of particular statutes. Some federal enactments fail to contain statutes of limitations, definitions of certain ambiguous terms, clauses addressing the existence of federal preemption, and other provisions that are vital to a full understanding of a statute's effects and "reach." As the following discussion indicates, the institution of legislative procedures aimed at preventing these "statutory gaps" from arising in new statutes may constitute a relatively painless means of court reform -- a method directed at eliminating some of the conditions that give rise to the costly litigation that crowds judicial dockets.

Whether or not such statutory gaps are intended by Congress,[3] they have most unfortunate consequences. Litigation inevitably is generated by ambiguities regarding the ambit of new statutory requirements. Resources devoted to litigation that could have been avoided through artfully crafted legislative provisions represent a pure social waste. Additional social losses stem from the contribution of such unnecessary litigation to the problems of court crowding and delay that afflict the judicial system. These losses may be magnified (and the period of "statutory uncertainty" may be protracted), to the extent different courts reach inconsistent or ambiguous results when "filling in" particular legislative gaps. Statutory ambiguities also impose costs on private individuals whose interests are affected by new legislation. Uncertainty about statutory rights and duties -- and the fear of litigation aimed at resolving statutory ambiguities -- may diminish the welfare of those individuals by discouraging them from pursuing desired courses of action. Finally, to the extent major interstitial statutory gaps are filled in by unelected judges, rather than by the people's elected representatives, our system of government is undermined. Federal judges should not be assigned the essentially legislative task of creating substantive interstitial rules that effectively add provisions to a statute. The separation of powers is undermined if Congress leaves it to the judiciary to "complete" newly passed laws.

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[2] A judicial impact statement that requires Congress to consider whether specific "housekeeping" issues are addressed in a statute is far more effective at directing legislative attention to possible shortcomings in drafting than an ill-defined, open-ended requirement that Congress consider a bill's possible effects on the judicial workload. Unlike a detailed "checklist" requirement, a general "judicial impact" requirement can easily be "fulfilled" through a cursory examination or a proposed statute -- an examination that may not pinpoint the specific deficiencies that are highlighted in a checklist.

[3] This memorandum does not address the question of whether a majority of Congress intends to leave unresolved particular questions of statutory application. The "public choice" (continued...)

Congressional efforts to avoid unnecessary statutory gaps could be enhanced through reliance on a "checklist" of "statutory housekeeping" provisions. Such a standardized checklist would set forth basic questions bearing on the scope of application of a new proposed statute -- questions such as the statute of limitations, the definition of key statutory terms, the extent of federal preemption, the existence of a private right of action, and so forth. The appropriate congressional drafting committee (or committees) could consult this checklist, in order to ensure that draft legislation did not include significant and avoidable gaps or ambiguities. While adherence to a checklist would not eliminate unavoidable difficulties in statutory interpretation, it would at least help minimize unnecessary litigation over matters that could readily have been addressed by Congress.

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[3] (...continued)
literature of political economy would imply that "statutory gaps" may not be accidental. Indeed, the existence of particular statutory ambiguities may further the narrow interests of special interest groups (the "factions" whose abusive actions were decried by Madison in The Federalist No. 10 (J. Madison) (J. Cooke ed. 1961)), whose lobbying activities influence the shape of certain legislative enactments. The seminal public choice work on the factors that influence collective decisions by legislative bodies is J. Buchanan and G. Tullock, The Calculus of Consent (1962).

The following discussion makes an initial attempt to identify specific questions that might be included in such a checklist. The discussion proceeds by specifying individual checklist items, then identifying one or more examples of litigation that stemmed from a statutory failure to take into account each such item. The checklist compiled is tentative and subject to revision. Further analysis may indicate that items should be added to, or subtracted from, the initial checklist. Moreover, the cases discussed following each checklist item are merely illustrative. Additional research undoubtedly would yield a far more extensive compilation of examples. The examples described herein are merely intended to demonstrate that "statutory gaps" are not a mere theoretical problem -- they give rise to substantial real world controversies.

The checklist of suggested questions is as follows: (1) does the proposed law contain a civil statute of limitations?; (2) does the proposed law apply retroactively to pending matters?; (3) if the proposed law provides for an award of attorneys' fees, does it contain a provision clearly specifying the terms under which an attorneys' fee can be awarded?; (4) does the proposed law contain a clear preemption provision?; (5) does the proposed law explicate the state of mind required to establish a criminal offense?; (6) does the proposed law grant private parties a right to sue?; (7) does the proposed law contain a "constitutional severability" provision?; (8) does the proposed law require that administrative remedies be exhausted?; (9) does the proposed law set forth the standards governing the assertion of personal jurisdiction?; (10) does the proposed law permit the arbitration of disputes?; (11) does the proposed law specifically define key statutory terms?; and (12) does the proposed law require formal administrative proceedings? A short concluding section suggests, by way of example, a few other items that might be included in a checklist.

B. Discussion

1. Does the Proposed Law Contain a Civil Statute of Limitations?

A federal statute's failure to specify the statute of limitations applicable in civil enforcement actions may unnecessarily complicate litigation.[4] Such a failure in effect leaves it to judges to "legislate" an "appropriate" statute of limitations -- an exercise in subjective judgment that may yield divergent results, depending upon the judge who is reviewing the case.

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[4] Such a problem does not arise in federal criminal litigation, given the existence of a five-year general "catchall" statute of limitations (18 U.S.C. § 3282) applicable to federal (non-capital) criminal laws that do not specify an applicable statute of limitations.

To illustrate by example, the failure of the Racketeer Influenced and Corrupt Organizations Act (RICO) to specify a civil statute of limitations has generated substantial uncertainty. In the words of a 1985 American Bar Association task force report, the current state of the law regarding the applicable civil RICO statute of limitations is "confused, inconsistent, and unpredictable."[5] This confusion is reflected by the fact that different lower federal courts employed a variety of divergent state statutes of limitations in civil RICO actions.[6] Some courts used the state limitations period that most closely resembled the predicate offenses alleged in the particular RICO claim.[7] Other courts selected a uniform statute of limitations applicable to all civil RICO actions brought within a given state.[8]

Very recently, in Agency Holding Corp. v. Malley-Duff & Associates, Inc., 107 S. Ct. 2759 (1987), the Supreme Court, per Justice O'Connor, specified that a uniform federal statute of limitations should apply in civil RICO cases. In that case, the district court held that certain RICO claims brought against an insurance company were barred by Pennsylvania's two-year fraud statute of limitations. The Third Circuit Court of Appeals reversed, holding that Pennsylvania's six-year "catchall" residual statute of limitations should have been applied. Because this suit had been filed less than four years after the earliest time the RICO claims could have accrued, it was not barred, according to the court. While the Supreme Court majority affirmed the Court of Appeals holding that the suit was not barred, it reasoned instead that the four-year statute of limitations applicable to Clayton Act civil enforcement actions (15 U.S.C. § 15b) applies in all RICO civil enforcement actions.

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[5] American Bar Association, Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking, and Business Law 391 (1985).

[6] Despite these divergences, all the lower court decisions applied state, rather than federal, statutes of limitations. Id. at 387.

[7] See, e.g., Silverberg v. Thomson McKinnon Securities, Inc., 787 F.2d 1079 (6th Cir. 1986); Burns v. Ersek, 591 F. Supp. 837 (D. Minn. 1984).

[8] See, e.g., Tellis v. United States Fidelity & Guaranty Co., 805 F.2d 741 (7th Cir. 1986); Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984); Teltronics Services, Inc. v. Anaconda-Ericsson, Inc., 587 F. Supp. 724 (E.D.N.Y. 1984).

The majority concluded that the Clayton Act "offers the closest analogy" to civil RICO. While he concurred in the judgment, Justice Scalia refused to join the majority's opinion. He pointedly remarked, "[w]hile at first glance it may seem a small step from the familiar practice of borrowing state statutes of limitations to today's decision to borrow a federal one, in my view it turns out to be a giant leap into the realm of legislative judgments."[9]

Considerable confusion has also arisen due to the absence of a federally-specified statute of limitations applicable to civil rights claims brought pursuant to 42 U.S.C. § 1981. Very recently, in Goodman v. Lukens Steel Co., 107 S. Ct. 2617, (1987), a closely divided Supreme Court affirmed the Third Circuit Court of Appeals' holding that Pennsylvania's two-year statute of limitations governing personal injury actions, rather than that state's six-year statute of limitations governing contract claims, applied to section 1981 racial discrimination claims brought against a Pennsylvania steel company and several unions. (The district court had held that the six-year contractual statute of limitations applied.) Justice White's plurality opinion also concluded that the two-year statute of limitations should be applied retroactively to petitioning claimants, even though Third Circuit precedents prior to this case had refused to apply the two-year standard to section 1981 claims. Justices Marshall and Blackmun joined Justice Brennan's partial dissent, which argued that the six-year contractual statute of limitations was the correct standard.

In sum, the RICO and section 1981 examples illustrate the confusion and uncertain, ad hoc "judicial legislation" that has arisen due to the failure of major federal statutes to specify civil statutes of limitation.

2. Does the Proposed Law Apply Retroactively to Pending Matters?

Unpredictable litigation outcomes have resulted from the failure of certain federal statutes to specify whether they apply retroactively to pending matters. The general rule laid down by the Supreme Court is that federal cases should be decided in accordance with the law existing at the time of decision. See, e.g., Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 486 n.16 (1981); Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 109 (1801). On the other hand, the Court has also recognized an exception to this retroactivity principle where application of the intervening law would result in "manifest injustice." See Bradley v. Richmond School Board, 416 U.S. 696, 717 (1974).[10/] According to the Bradley Court, the three factors that are pertinent to this "manifest injustice" exception are: (1) the nature and identity of the parties; (2) the nature of their rights; and (3) the nature of the impact of the change in the law upon those rights. The "manifest injustice" test is an inherently subjective standard that confers enormous discretion on individual judges in determining whether or not a law should be applied retroactively.

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[9] 107 S. Ct. at 2767 (emphasis added). Justice Scalia stressed that, in applying a state statute of limitations, a federal court does not have to make a new legislative judgment -- a state legislature will already have made that judgment. In contrast, a federal court is in effect rendering a legislative judgment when it "borrows" a statute of limitations enacted with reference to a different cause of action than the one under consideration. See 107 S. Ct. at 2774.

For example, in Iowa Power & Light Co. v. Burlington Northern, Inc., 647 F.2d 796 (8th Cir. 1981), the Eighth Circuit Court of Appeals denied a railroad's petition to review ICC orders prescribing maximum reasonable rates for the transportation of coal between Wyoming and Iowa. The court had to interpret the applicability of the 1980 Staggers Rail Act, which contains no provision for its effect on pending matters, other than pending rate bureau proceedings. Finding that the Bradley "manifest injustice" criteria had been met, the court determined that the Staggers Act, which was effective on the date of the ICC's final decision, did not apply to the instant proceeding, which involved rates negotiated in the 1973-1976 period. Although the Staggers Act's "national concern" regarding the deterioration of the nation's rail system "encourage[d], to some extent, retroactive application of the legislation", the court nevertheless concluded that "the national concerns of the [Staggers] legislation w[ould] be met without such retroactivity." 647 F.2d at 805. The ICC, on the other hand, had argued that the Staggers Act was applicable to the instant proceeding. 647 F.2d at 803.[11/]

[10/] In Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), the Supreme Court held that a decision specifying the applicable state statute of limitations in another context should not be applied retroactively because the decision overruled clear circuit precedent on which the complaining party was entitled to rely, because the new limitations period had been occasioned by a change in substantive law the purpose of which would not be advanced through retroactivity, and because retroactive application would be inequitable.

[11/] Consistent with the Iowa Power & Light holding, subsequent Sixth Circuit cases refused to apply the Staggers Act

(continued...)

By way of contrast, in In re Reynolds, 726 F.2d 1420 (9th Cir. 1984), the Ninth Circuit Court of Appeals deemed it appropriate to give retroactive effect to a Bankruptcy Code amendment. The State of Idaho appealed from a Bankruptcy Court Order, which held that certain child support payments that mothers had assigned to the states were dischargeable in fathers' bankruptcy proceedings. The district court affirmed, holding that a Bankruptcy Code amendment, effective on August 13, 1981 (11 U.S.C. § 523(a)(5)(A)), applied to pending bankruptcy cases in which the debtor filed a petition before that date. (That amendment did not specifically address its applicability to pending cases.) After a brief review of the Bradley "manifest injustice" criteria, the Ninth Circuit reversed, cautiously stating that "we cannot say that application of the amendment to actions pending at the time of the amendment would cause such 'manifest injustice' as to compel an exception to the rule that a court applies the law in effect on the date of decision. It is not manifestly unjust to expect parents to meet their responsibilities." 726 F.2d at 1424-25.

As Iowa Power & Light and Reynolds illustrate, the Bradley criteria inevitably spawn subjective judicial judgment calls with regard to retroactivity. This problem of subjectivity, which produces uncertainty and litigation, could be avoided by reliance on objective statutory clauses that address retroactivity.

3. If the Proposed Law Provides for an Award of Attorneys' Fees, Does it Contain a Provision Clearly Specifying the Terms Under Which an Attorneys' Fee Can Be Awarded?

Any statute providing for the award of attorney's fees should clearly specify the terms under which fees can be awarded.[12] The failure to do so may generate uncertainty

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[11] (...continued) retroactively to rate disputes. See Cleveland-Cliffs Iron Co. v. ICC, 664 F.2d 568 (6th Cir. 1981) (Staggers Act could not be applied to rate dispute that was pending on appeal at time Act was enacted); Hanna Mining Co. v. Escanaba & L.S.R.R., 664 F.2d 594 (6th Cir. 1981) (Staggers Act could not be applied to rate dispute that was pending on effective date of Act).

[12] Under the "American Rule," "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). This traditional rule should continue to hold in all cases in which a statute does not specifically provide for an attorneys' fee.

regarding the type of work that qualifies for an attorneys' fee, and may result in expansive, costly definitions of the scope of legal activity qualifying for an attorneys' fee award.

The need for clear statutory specification of an attorneys' fee is illustrated by the Supreme Court recent holding in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 106 S. Ct. 3088 (1986). That case involved a construction of section 304(d) of the Clean Air Act, 42 U.S.C. § 7604(d), which provides that "in any action" to enforce the Act the court "may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." The Supreme Court held that this language authorized attorneys' fees for time spent by respondent (an environmental special interest group) in submitting comments on proposed environmental regulations and in administrative hearings before the Environmental Protection Agency. The Court rejected the position advanced by Pennsylvania and the United States, that the "actions" contemplated by section 304(d) are judicial actions, not administrative proceedings. The Court acknowledged that the proceedings for which attorneys' fees were granted were not "judicial" (in the sense that they did not occur in a courtroom), and did not involve "traditional" legal work (such as examination of witnesses or selection of jurors). Nevertheless, the Court reasoned that this "administrative" work was as vital as "courtroom" work for the securing of relief under the Clean Air Act.

4. Does the Proposed Law Contain a Clear Preemption Provision?

Substantial and costly uncertainty regarding the viability and applicability of state law may be raised by a federal statute's failure to address the question of state law preemption. This principle is nicely illustrated by the tangled history of litigation surrounding the preemptive effects of the federal Williams Act, which governs hostile corporate stock tender offers (by, inter alia, requiring that tender offers remain open at least 20 business days). The Williams Act's language does not address preemption; litigation concerning that Act has cast doubt on what rules govern an important sphere of commercial activity.

In Edgar v. MITE Corp., 457 U.S. 624 (1982), a plurality of the Supreme Court concluded that the Williams Act preempts state statutes that "upset the balance" between tender offerors and target companies. Applying this test, the Court struck down an Illinois takeover statute that it deemed "unbalanced" in favor of incumbent management. The Illinois law failed the "balance" test in that it: (1) provided for a 20-day tender offer precommencement period, which allowed management to disparage an upcoming offer before it was announced (the Williams Act contains no precommencement notice provisions); (2) provided for a hearing on a tender offer, that, because it set no deadline, allowed management to "stymie indefinitely" a takeover; and (3) required that the "fairness" of tender offers be reviewed by the Illinois Secretary of State (thereby interfering with the Williams Act's objective of leaving investors free to make their own decisions).

While MITE called into question the viability of state takeover laws, the Court's recent decision in CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637 (1987), indicates that such laws will not necessarily be struck down. Justice Powell's majority decision in CTS upheld an Indiana takeover law that gave preexisting, disinterested shareholders of certain Indiana corporations at least 50 days to vote on whether to grant voting rights to an acquiror who obtained at least 20 percent of outstanding corporate stock. According to the majority opinion, the Indiana law met the MITE balance test: it protected shareholders from coercion by either corporate management or takeover bidders without imposing unreasonable delays on the consummation of tender offers. Because the law was "balanced," it was in accord with, and not preempted by, the Williams Act. In dissent, Justice White argued that, in many instances, the Indiana law would effectively prevent an individual investor from selling his stock for a premium. Accordingly, in Justice White's view, the Indiana law conflicted with the Williams Act's intention to protect individual investors, and, thus, was preempted by the Williams Act.

These two Supreme Court Williams Act decisions illustrate how congressional silence on the issue of preemption may give rise to judicially-created tests for upholding or striking down a panoply of important state laws. Such tests may bring about costly, idiosyncratic, case-by-case determinations on issues of great significance to the economy -- and to the relative allocation of regulatory authority between the federal government and the states. In sum, congressional specification of a statute's preemptive (or non-preemptive) effect would eliminate a source of costly litigation, prevent the judiciary from having to craft quasi-legislative preemption standards, and ensure that Congress (not the courts) set policy regarding the relative state-federal allocation of regulatory authority.

5. Does the Proposed Law Explicate the State of Mind Required to Establish a Criminal Offense?

Many federal criminal laws statutes deal inadequately with the state of mind (the "mens rea") required to establish a criminal offense. This deficiency has engendered confusing and inconsistent adjudication, as the courts have concocted their own standards for describing the states of mind required to establish criminal culpability. Professor Lloyd Weinreb, consultant to the

1970 National Commission on Reform of Criminal Law, put it succinctly:

> Unsurprisingly, the courts have been unable to find substantive correlates for all these varied [judicially formulated] descriptions of mental states, and, in fact, the opinions display far fewer mental states than the statutory language. Not only does the statutory language not reflect accurately or consistently what are the mental elements of the various crimes; there is no discernible pattern or consistent rationale which explains why one crime is defined or understood to require one mental state and another crime another mental state or indeed no mental state at all.[13/]

Particularly difficult problems may arise when a federal statute does not specify whether a culpable state of mind need be demonstrated to prove a criminal violation. A court must first determine whether the crime being considered is a "strict liability" offense for which no showing of culpable intent is required. If the court determines that culpable intent must be shown (an exercise fraught with ambiguity),[14/] it must next decide what degree of intent is needed to prove a criminal violation -- a form of "judicial legislation."

For example, in United States v. United States Gypsum Co., 438 U.S. 422 (1978), the Supreme Court held for the first time that a defendant's state of mind or intent is a necessary element of a federal criminal antitrust offense. In affirming the Third Circuit's reversal of defendants' conviction for price fixing (in violation of section one of the Sherman Act, 15 U.S.C. § 1), the Supreme Court, per Chief Justice Burger, ruled that action undertaken with the knowledge of its probable anticompetitive consequences -- and having the requisite anticompetitive

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[13/] National Commission on Reform of Federal Criminal Law, Working Papers 120 (1970) (statement by Professor Lloyd Weinreb). Cases illustrating the confusing and inconsistent judicial formulation of culpable states of mind are compiled in Senate Committee on the Judiciary, Criminal Code Reform Act of 1981, S. Rep. No. 307, 97th Cong., 1st Sess. 63-64 (1982) (hereinafter Criminal Code Report).

[14/] For example, in the past the courts have split on the question whether a person charged with assaulting a federal officer (in violation of 18 U.S.C. § 111) must be shown to have known that the person he was assaulting was in fact a federal officer. See Senate Committee on the Judiciary, Criminal Code Reform Act of 1979, S. Rep. No. 553, 96th Cong., 2d Sess. 67 (1980) (citing United States v. Feola, 420 U.S. 671 (1975)).

effects -- would be a sufficient predicate for a finding of Sherman Act criminal liability. Even though the Sherman Act did not specify a required state of mind, a mere finding of negligence or recklessness would not be sufficient to prove such a criminal violation, according to the Court. The Court also held, however, that an elevated degree of culpable intent -- purpose -- need not be present to establish a Sherman Act violation. Mere knowledge would be sufficient.

In order to eliminate the confusion and use of ad hoc judicial tests regarding the state of mind, the proposed 1981 Federal Criminal Code specified that only four terms be used to describe the requisite mental state for criminal culpability: intentional, knowing, reckless, or negligent.[15] Although that proposed Criminal Code was not adopted, strict reliance on those terms in all newly-enacted criminal statutes (perhaps with a fifth term, "strict liability," added) could simplify litigation, and prevent the courts from adopting their own varying and subjective standards in resolving the "state of mind" issue. In any event, the specification of some standard -- even if not those specific tests -- would diminish uncertainty and eliminate case law inconsistencies.

6. Does the Proposed Law Grant Private Parties a Right to Sue?

The failure of statutes to specify the nature and extent of private rights of action may lead to confusion and inconsistent adjudications. Litigation arising under the Employees Retirement Income Security Act of 1974 (ERISA) illustrates this problem. In Award Service, Inc. v. Northern California Retail Clerks Unions & Food Employers Joint Pension Fund, 763 F.2d 1066 (9th Cir. 1985), the Ninth Circuit held that employers have a private right of action under ERISA to sue multi-employer pension plan trustees for a refund of mistaken overpayments. A subsequent decision by the Eleventh Circuit squarely conflicted with this holding, finding no private right of action. Dime Coal Co., Inc. v. Combs, 796 F.2d 394 (11th Cir. 1986).

Accordingly, it would appear to be desirable, whenever possible, for congressional statutes to state with particularity whether or not a private right of action exists, and, if it does, what is the nature and extent of the private right to sue. Such statutory specifications would ensure that private rights under a statute were established by the people's elected representatives, rather than by unelected judges.

7. Does the Proposed Law Contain a "Constitutional Severability" Provision?

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[15] Criminal Code Report, supra note 13, at 65.

Some statutes fail to include a "severability clause" -- a statement that if any statutory provision is held unconstitutional, the other statutory provisions (assuming they are constitutional) are to remain in full force and effect. If Congress does not wish a partial finding of unconstitutionality to jeopardize an entire statutory scheme, it would appear to be advantageous for Congress routinely to insert severability provisions into new statutes. Congress may, of course, believe that a finding of unconstitutionality with regard to one statutory provision would so alter the legislative balance struck that the other statutory provisions should likewise be rendered inoperative. However, if that is the case, the solution is not to neglect to include a severability clause. Rather, it would appear preferable for Congress to frame a clause declaring that a finding of unconstitutionality with regard to any statutory requirement (or specified statutory requirements) would render null and void all other statutory provisions. Severability provisions forestall litigation uncertainties; the Supreme Court has held that the inclusion of a severability clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. *See* *INS v. Chadha*, 462 U.S. 919, 932 (1983); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 235 (1932).

Uncertainties spawned by the lack of a severability clause are illustrated by the Supreme Court's recent decision in *Alaska Airlines, Inc. v. Brock*, 107 S. Ct. 1476 (1987). In *Alaska Airlines*, the Court considered the constitutionality of an airline Employee Protection Program (EPP), enacted as section 43 of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1552. The EPP imposes on covered airlines the "duty to hire" dislocated protected employees, who have a "first right of hire" with airlines hiring new staff. Section 43 authorizes the Labor Secretary to issue regulations for the administration of the EPP, but section 43(f)(3) contains a legislative veto provision stating that any final regulation shall become effective after 60 legislative days following its submission to Congress, unless during that period either House of Congress adopts a resolution disapproving it. Section 43 does not contain a severability clause. The Court held that this legislative veto provision, which was unconstitutional, was severable from the remainder of the EPP program, which would remain in full force and effect. The Court held that the standard for determining the severability of an unconstitutional provision is that unless it is evident that Congress would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if the provisions that remain are fully operative as law. The relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with congressional intent, according to the Court.

Applying these standards, the Court ruled that severability was supported by the language and structure of the Airline Deregulation Act; the affirmative duty that statute placed directly on air carriers suggested Congress' intent that the EPP's first hire provisions should survive in the absence of a legislative veto clause.

In short, the Supreme Court attempts to determine whether Congress would have separately enacted the constitutional provisions of a statute, if it had know that certain statutory provisions would be held unconstitutional. While this may be the only feasible approach in the absence of a severability (or rejection of severability) provision, it assigns the judiciary the impossible task of determining whether at some point in the past the legislative branch would have approved a statutory package other than the one it actually enacted. This exercise merely yields subjective guesses by judges, who cannot "read the minds" of a past Congress. It inserts the judiciary into a process that should have been carried out by the legislative branch. It would be far preferable for Congress to avoid this problem through the crafting of simple severability (or rejection of severability) provisions.

8. Does the Proposed Law Require that Administrative Remedies be Exhausted?

Many federal statutes create administrative processes for the determination of claims or the settlement of disputes. A frequent problem raised by litigation pursuant to such statutes is whether administrative remedies must be exhausted as a prerequisite to access to the federal courts. Congressional silence regarding the existence of an exhaustion requirement may discourage full reliance on statutorily-created administrative systems, thereby engendering litigation that might not have been required. Such silence may also cause confusion by prompting inconsistent court rulings regarding exhaustion. These difficulties could be avoided if Congress routinely included "exhaustion of administrative remedies" clauses in each newly-enacted statute.

Litigation under ERISA illustrates the inconsistent litigation results that may arise from a statutory failure to specify the existence (or non-existence) of an exhaustion requirement. ERISA does not state whether an employee must first present a grievance to an employer's pension benefit plan before filing suit in federal court. The Third and Ninth Circuits have held that an ERISA-covered employee need not exhaust internal administrative remedies (by submitting a claim to the employer's pension plan) before filing suit under ERISA for alleged interference with the employee's statutory rights. Zipf v. American Telephone & Telegraph Co., 799 F.2d 889 (3rd Cir. 1986); Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984). On the other hand, the Seventh and Eleventh Circuits have required employees to submit their statutory claims to the employer's pension plan before seeking judicial relief. Kross v. Western Electric Co., 701 F.2d 1238 (7th Cir. 1983); Mason v. Continental Group, Inc., 763 F.2d 1219 (11th Cir. 1985).

9. Does the Proposed Law Set Forth the Standards Governing the Assertion of Personal Jurisdiction?

A federal statute's failure to specify the standard governing the assertion of personal jurisdiction may lead to disparities in litigation results. Such a failure causes jurisdictional determinations to turn on the jurisdictional law of the forum state. Accordingly, the availability of statutory redress may differ from jurisdiction to jurisdiction. It would be advantageous for Congress statutorily to specify whether or not it desires such a result.

The significance of statutory silence on the issue of personal jurisdiction is illustrated by Point Landing, Inc. v. Omni Capital International, Inc., 795 F.2d 415 (5th Cir. 1986) (en banc). In this case certain investors alleged that a British investment company and its representative fraudulently induced them to invest in silver straddle commodity futures by misrepresenting the tax advantages of such transactions. The en banc Fifth Circuit held that the Commodity Exchange Act (CEA), rather than the 1934 Securities Exchange Act (1934 Act), afforded the exclusive remedy for actions involving discretionary commodity accounts, such as the instant case. (The court based this holding on its reading of the legislative history of the Commodity Futures Trading Commission Act.) Accordingly, the Fifth Circuit affirmed the district court's dismissal for want of personal jurisdiction. The Fifth Circuit explained that there would have been no jurisdictional problem had the 1934 Act applied, since the 1934 Act authorizes nationwide service of process. The CEA, however, is silent on the subject of service of process. Thus, jurisdiction in this case was controlled by Federal Rule of Civil Procedure 4(e), which incorporates the forum state's long-arm statute when there is no federal statutory jurisdictional provision. Because plaintiffs did not challenge the district court's finding that defendants lacked sufficient contacts with Louisiana (the forum state) to come within its long-arm statute, the Fifth Circuit affirmed the district court's dismissal.

10. Does the Proposed Law Permit the Arbitration of Disputes?

Parties entering into a business transaction may specify that any disputes arising in the course of business are to be settled by arbitration rather than by litigation. Uncertainties may arise if federal statutes applicable to that transaction fail to state whether or not statutory provisions may be superseded by an arbitration agreement in the event of a disagreement. Such uncertainties could be avoided if each new statute were to address the waivability of statutory requirements in light of a mutually agreed-upon arbitration agreement.

Problems of interpretation that can arise in the absence of a statutory arbitration provision are illustrated by the Supreme Court's recent decision in Shearson/American Express, Inc. v. McMahon, 107 S. Ct. 2332 (1987). The McMahons were pension fund customers who established pension fund accounts with Shearson. The customers' agreement entered into by Shearson and the McMahons specified that, "[u]nless unenforceable due to federal or state law," any controversy arising out of the agreement would be settled by arbitration in accordance with the rules of specified organizations. Subsequently, the McMahons sued Shearson for violation of the antifraud provisions of section 10(b) of the Securities Exchange Act of 1934 (1934 Act), and of the Racketeer Influenced and Corrupt Organizations Act (RICO). Shearson moved to compel arbitration of these claims pursuant to section 3 of the Federal Arbitration Act, which requires a court to stay its proceedings if it is satisfied that an issue before it is arbitrable under an arbitration agreement. Neither the 1934 Act nor RICO addressed the status of arbitration agreements. A closely divided Supreme Court held that both the 1934 Act claims and the RICO claims were arbitrable. The Court noted that the Arbitration Act establishes a federal policy favoring arbitration agreements. According to the Court, the Act's mandate may be overridden only by a showing that, in passing another statute, Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. The Court held that neither the 1934 Act nor RICO evinced any congressional intent to preclude arbitration. It found that nothing in RICO's text or legislative history even arguably evinced a congressional intent to exclude civil RICO claims from the Arbitration Act's dictates. In the majority's view, section 29(a) of the 1934 Act, which declares void an agreement to waive "compliance with any provision of the [1934 Act]", only prohibited waiver of the Act's substantive obligations -- it did not prohibit arbitration. In partial dissent, Justices Blackmun, Marshall, and Brennan opined that the legislative history of 1934 Act amendments, combined with the Supreme Court's 1953 holding in Wilko v. Swan, 346 U.S. 427 (1953) (holding that claims under the 1933 Securities Act, which has a similar antiwaiver provision, are not subject to compulsory arbitration under an arbitration agreement), compelled the conclusion that compulsory arbitration of 1934 Act claims was prohibited. The dissenters' position had been held by almost all federal appellate courts.

11. Does the Proposed Law Specifically Define Key Statutory Terms?

Unnecessary litigation controversies may be engendered due to a statute's failure to define key terms. This suggests that congressional drafters should carefully examine legislative proposals with an eye to defining terms of art or ordinary words that are given a special statutory meaning. Controversies over the meaning of statutory terms pervade the federal case reporters. Two sets of examples illustrate the types of problems caused by the absence of definitions.

In United States v. Miller, 753 F.2d 19 (3d Cir. 1985), the Third Circuit for the first time addressed the meaning of "substantial question" for purposes of the 1984 Bail Reform Act (1984 Act) provision that limits bail pending appeal to defendants who have presented a substantial issue. "Substantial question" is not specifically defined in the 1984 Act. Miller held that a "substantial question" is one that is novel, left undecided by controlling precedent, or fairly doubtful. A number of courts criticized Miller, adopting instead the Eleventh Circuit's competing position (enunciated in United States v. Giancola, 754 F.2d 898 (11th Cir. 1985)) that a "substantial question" is a "close question" or one that could be decided either way. Subsequently, the Third Circuit "clarified" its Miller definition by holding that, if there is no controlling precedent, a "substantial question" is one that is "fairly debatable" among jurists of reason. United States v. Smith, 793 F.2d 85 (3d Cir. 1986). While conceding that the Miller definition might have been imprecise, the Smith court complained that defining a substantial question as a close one (the Giancola approach) turns the district courts into bookmakers who must predict the probability of reversal. The Smith court added that, when there is any doubt about the significance of an issue, the approach of United States v. Handy, 761 F.2d 1279 (9th Cir. 1985) -- which defined a "substantial question" as a "fairly debatable" one -- is preferable.

12. Does the Proposed Law Require Formal Administrative Proceedings?

A proposed federal statute that contemplates administrative proceedings (either rulemakings or hearings) should specify whether such proceedings are to be formal (and, thus, subject to the Administrative Procedure Act (APA)) or informal. By so specifying, Congress can avoid litigation concerning the appropriateness of the administrative proceeding employed. In addition, federal statutes that require agencies to carry out administrative reviews (whether formal or informal) should clarify to the greatest extent possible the "administrative law pigeonhole" within which such reviews fall, in order to avoid unnecessary litigation over the procedural sufficiency of such reviews.

The confusion that can arise due to insufficient statutory specification of administrative actions is illustrated by the Ninth Circuit's decision in W.C. v. Bowen, 807 F.2d 1502 (9th Cir. 1987). At issue in this case was the means by which the Secretary of Health and Human Services (HHS) had implemented the "Bellmon Review Program," which targeted for high-level HHS review decisions by administrative law judges (ALJs) allowing social security benefit claims. The Program was enacted by the Secretary in response to the Bellmon Amendment to the Social Security Act,[16] which required the Secretary of HHS to "implement a program of reviewing, on his own motion, decisions rendered by administrative law judges as a result of hearings under section 221(d) of the Social Security Act".[17] The Program provided for own-motion review by the Secretary of ALJ decisions allowing disability benefits. Social security disability claimants who were denied benefits after such own-motion review (reversing ALJ determinations upholding claims) sued the Secretary of HHS, on the ground that the Bellmon Review Program had been improperly adopted. The district court granted summary motion for the claimants, and the Ninth Circuit affirmed. The Ninth Circuit ruled that the Program was a "substantive rule" within the meaning of the Administrative Procedure Act (APA), and, thus, subject to the APA's public notice and comment rulemaking requirement. Because the Program had been enacted without public notice and comment, the appeals court held that the Program was an invalid rule (and thus reinstated ALJ decisions granting benefits). The Ninth Circuit rejected the Secretary's cogent argument that the program was a mere "interpretive rule" not requiring notice and comment rulemaking -- a rule that merely interpreted the Secretary's longstanding authority to review ALJ decisions on his own motion. The W.C. litigation would have been avoided had Congress specified, in enacting the Bellmon Amendment, whether or not the Bellmon Program had to be implemented through a formal notice and comment procedure.[18]

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[16] Social Security Disability Amendment of 1980, Pub. L. No. 96-265, § 304(g), 94 Stat. 441, 456.

[17] Citing legislative history, the Ninth Circuit in W.C. stated that the Bellmon "Amendment was a response to the increasing number of appeals to ALJs, the high number of allowance decisions by them, and the policy that only ALJ decisions denying claims were subject to review." 807 F.2d at 1503.

[18] By automatically reinstating ALJ decisions granting benefits, the Ninth Circuit's W.C. decision arguably

(continued...)

13. Other Possible Checklist Items

The checklist items set forth above are merely suggestive. Further research may identify a variety of other "statutory gap" questions that merit being added to the checklist. Merely by way of example, uncertainty may arise if a statute fails to specify whether statutorily-based administrative decisions are subject to judicial review; whether statutory provisions that apply to the states also apply to the District of Columbia; and the extent to which statutory provisions creating liability apply to the states.

III. RECOMMENDATIONS

This memorandum has suggested that uncertainties could be diminished and some sources of litigation could be eliminated if Congress, when drafting legislation, sought to include provisions addressing fundamental "housekeeping" questions bearing on the scope of statutory application. Such "housekeeping" questions could be embodied in a "checklist" that would be consulted as part of the legislative drafting process. This analysis prompts the following recommendation.

Both the House and Senate should consider adopting procedures to require the appropriate reporting committee (or committees) to certify that, prior to reporting out the bill, it has consulted a checklist embodying fundamental questions bearing on the scope of statutory application and given them due consideration. (The items discussed in this memorandum are representative of the sorts of questions that could be included in the checklist.) Such a checklist would constitute a "judicial impact statement" with real bite. The rule could also require the reporting committee (or committees) to certify that it has, to the greatest extent deemed advisable, sought to incorporate responses to applicable checklist questions in bill provisions, and to explain those instances where it has not. The latter requirement would not "straightjacket" committees. It would merely encourage them to seek as best as possible to eliminate possible sources of statutory ambiguity, while leaving it to the ultimate discretion of the reporting committees to decide whether particular checklist questions merited being affirmatively addressed.

18/(...continued)
frustrated Congress' goal, expressed in the Bellmon Amendment, of encouraging the Secretary of HHS to closely review the ALJs' affirmative social security benefit determinatio

U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 11, 1988

Honorable Howell Heflin
Chairman
Subcommittee on Courts and
Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to Senator Thurmond's written question with respect to the recent testimony of Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, concerning S. 1482, the Judicial Improvements Act of 1987. The Senator's question was as follows:

> In your prepared statement, you remark that in addition to the reforms contained in S. 1482, you would like to see a re-examination of the diversity jurisdiction in certain situations such as automobile accident cases. Could you please expand on the need for these changes in current law?

The remainder of this letter will address, first, the reasons for abolishing or substantially curtailing diversity jurisdiction and, second, potential reforms in the event diversity jurisdiction is not eliminated.

I. Reasons for Abolishing Diversity Jurisdiction

The Department of Justice has long supported the abolition or substantial curtailment of the federal courts' diversity jurisdiction. We support such a reduction for many reasons. [1]

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[1] For recent testimony setting forth in some detail the reasons for the Department's position in favor of abolishing diversity jurisdiction, *see* *Diversity of Citizenship Jurisdiction -- 1982: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, House Comm. on the Judiciary*, 97th Cong., 2d Sess. 10-12 (1982) (testimony of Assistant Attorney General Jonathan C. Rose).

A. Caseload

As Mr. Markman stated in his testimony, in recent years, diversity cases have generally accounted for about 25 percent of all civil filings, 40 percent of all civil trials, 60 percent of all civil jury trials, and 15 percent of all appeals of district court decisions in the federal courts. Abolition of diversity jurisdiction accordingly would reduce greatly the caseload of the federal courts, with large cost savings and reductions of administrative burdens on the federal courts. According to a recent study by the Federal Judicial Center, 192 district court judgeships, 22 appellate court judgeships, and 144,000 juror days are attributable to federal diversity jurisdiction. That study estimates that over $126 million per year would be saved by the abolition of diversity jurisdiction. [2]

State judges have indicated that state courts could accommodate the additional cases that would be filed in state courts if diversity jurisdiction were eliminated. A resolution adopted by the Conference of Chief Justices in August 1977, and reaffirmed in August 1987, noted that the state courts are "able and willing . . . [to assume] all or part of the diversity jurisdiction presently exercised by the federal courts." A study published in 1978 reported that state courts would experience only a 1.03 percent overall increase in filings upon the total abolition of diversity jurisdiction. [3]

B. Efficiency

The elimination of diversity jurisdiction would promote judicial efficiency by eliminating a considerable amount of procedural litigation over whether diversity of citizenship exists. As Professor Thomas D. Rowe, Jr., noted in a study of the non-obvious effects of diversity cases, federal judges must spend considerable time determining the actual state citizenship of the parties, identifying manipulation or collusion designed to invoke or defeat federal diversity jurisdiction, determining the proper alignments of parties, sorting out the jurisdictional problems encountered by joinder and intervention, and dealing with the troublesome separate-claim removal provision (28 U.S.C.

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[2] Federal Judicial Center, Budget Savings That Would Be Achieved Through Changes in Federal Court Jurisdiction (1987).

[3] Flango & Blair, The Relative Impact of Diversity Cases on State Trial Courts, State Court Journal 20, 22-23 (Summer 1978).

§ 1441(c)). These issues would largely disappear from the federal system if diversity jurisdiction were abolished. [4/]

C. Construing State Law

In diversity cases, federal judges are required to apply state law as construed by the state courts. Erie Railroad v. Tompkins, 304 U.S. 64 (1938). The determination of (or sometimes guessing at) state law by federal courts diverts precious judicial resources and generates needless uncertainty in the adjudication of cases. Often, because of lack of state precedents, the federal courts are required to hypothesize how the state courts would have decided the issue. As Judge Friendly stated, in diversity "cases federal courts cannot discharge the important objective of making law. When the state law is plain, the federal judge is reduced to a 'ventriloquist's dummy to the courts of some particular state' . . . . In other cases what passes as an attempt of prediction is mere guess or fiat without any basis in state precedents at all." [5/]

Further, the diversion of cases from state to federal courts decreases the opportunity for state courts to issue decisions of precedential value -- exacerbating the difficulty in determining the applicable state law. Often definitive resolution of ambiguous or undecided state law issues may be deferred for long periods because the only cases raising the issues are brought in federal court under diversity jurisdiction. As Judge Skelly Wright acknowledged in 1967:

> Were there no diversity jurisdiction, the citizenry and bar of Tennessee, Texas, and Mississippi would now be advised as to whether "privity" is still a bar to the suit of an ultimate user against a manufacturer for negligence. Instead, they have only the guesswork, educated though it may be, of the Sixth and Fifth Circuits on these state questions. But for diversity, the returns would now be in as to whether under Kansas law a wife may sue for loss of consortium, and whether the death statutes in South Carolina and Pennsylvania recognize a right

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[4/] Rowe, Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 Harv. L. Rev. 963, 980-81 (1979).

[5/] H. Friendly, Federal Jurisdiction: A General View 142-43 (1973).

> of action on behalf of a stillborn fetus for injuries suffered during viability. 6/

Moreover, the social utility of the federal courts' efforts to guess at state law is further diminished because these estimations of state laws are not binding on the state courts.

D. Local Bias

Diversity jurisdiction is based largely on the belief that an out-of-state litigant would be treated more fairly by a federal than a state court. This rationale arose in a time when the nation was not so bound together by communication and transportation ties and when regional biases were much stronger. However, as Professor Charles Allen Wright has noted, it is "doubtful in the extreme that prejudice against a person because he is from another state is any longer a significant factor." 7/ That is particularly true with the growing practice of selecting jurors for both state and federal courts from the same pools. Further, in any given state, judges of the state courts and of the federal district courts are typically the products of the same state law system. In any event, the Department of Justice is confident that state judges can fairly and equitably decide controversies that come before them -- whether they are between citizens of the same or different states.

E. Federalism

As recently reemphasized by a Presidential executive order, Executive Order 12612, 52 Fed. Reg. 41685 (1987), principles of federalism are a cornerstone of this Administration's legal philosophy. The abolition of diversity jurisdiction would, in keeping with these principles, assure that state courts have the paramount role in resolving disputes concerning matters of local interest involving issues of state law.

6/ Wright, The Federal Courts and the Nature and Quality of State Law, 13 Wayne L. Rev. 317, 323 (1967) (footnotes omitted). Rather than concluding that diversity jurisdiction should be abolished or substantially reduced to resolve this problem, Judge Wright argued instead that Congress should act to federalize much of the States' common law. Id. at 333-37. This sort of "solution," however, would radically alter our federal system and, in particular, would turn on its head the purpose of diversity jurisdiction, which was to provide an alternate forum for adjudication of state law claims, not to supersede state law.

7/ Federal Diversity of Citizenship Jurisdiction: Hearings Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on Judiciary, 95th Cong., 2d Sess. 45 (1978).

F. Conclusion

For the reasons set forth above, the Department respectfully recommends that Congress generally abolish the federal courts' diversity jurisdiction. [8]

II. Alternatives to Complete Abolition of Diversity Jurisdiction

While a persuasive case can be made for the elimination of diversity jurisdiction, reforms short of abolition should also be considered. Many of these reforms have been considered in earlier Congresses. The Department prepared a lengthy letter in 1984 addressing the particular features of several bills introduced in the 98th Congress that embodied some of the types of reforms here suggested. [9] A copy of that letter is enclosed for the record.

A. Increase in (or Redefinition of) the Jurisdictional Minimum

The current jurisdictional minimum of $10,000 was set in 1958. As mentioned in Mr. Markman's testimony, raising that minimum to $50,000, as proposed in H.R. 3152, in large part would simply account for inflation in the interim. We would recommend that Congress consider raising the minimum to a higher amount, such as $100,000 or $500,000, as a way of more significantly reducing the burden of diversity cases on the federal courts.

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[8] The Department would not, however, oppose retention or creation of diversity jurisdiction in two limited situations: (1) interpleader and (2) mass tort jurisdiction. In the case of statutory interpleader, the federal courts, with authority for nationwide service of process, fulfill a function made necessary by the federal nature of our union that state courts cannot adequately perform. The Department's position in the case of mass tort jurisdiction was explained more fully in Mr. Markman's testimony on S. 1482 regarding a proposal in H.R. 3152 to establish jurisdiction to consolidate and hear certain mass tort cases in the federal courts. Subject to the qualifications that Mr. Markman identified, the Department would not oppose creation of such limited mass tort jurisdiction if, and only if, it were accompanied by the elimination, or substantial reduction, of the federal courts' diversity jurisdiction.

[9] Letter from Robert A. McConnell, Assistant Attorney General, to Hon. Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, House Comm. on the Judiciary (June 11, 1984).

A related reform would restrict the types of damages that could be included in calculating whether the jurisdictional minimum is met. For example, in determining at the outset of the case whether the amount in controversy will likely meet the jurisdictional minimum, punitive damages and non-economic damages, such as pain-and-suffering, could be excluded. Another possible formulation might require that, to resist dismissal, the litigant must demonstrate (1) that actual expenses equalled or exceeded fifty percent of the jurisdictional amount, and (2) that there is a substantial probability that other damages, when combined with actual expenses, will equal or exceed the requisite amount. We think that such a tightening up of the damages showing a litigant must make to obtain a federal forum would significantly reduce the number of cases in which diversity jurisdiction is obtained by means of exaggerating the size of claims.

B. Redefinition of Corporate Citizenship

Another reform included in H.R. 3152 would expand corporate citizenship to deem a corporation to be a citizen of any state in which it "does business." As mentioned in Mr. Markman's testimony, the Department supports this reform in concept, but recommends that citizenship be defined in a more easily administered, objective standard, such as whether the corporation is registered or otherwise licensed to do business in the state.

C. In-State Plaintiffs

Mr. Markman listed as another potential reform limiting diversity filings to out-of-state litigants. The historical concerns over bias by state judges and jurors against persons from other states simply do not justify allowing in-state plaintiffs the choice of a federal forum. Disallowing in-state plaintiffs the choice of a federal forum would equalize their treatment with that of in-state defendants; under current law, 28 U.S.C. § 1441(b) precludes in-state defendants from removing cases to federal court, but a plaintiff is free to institute a diversity suit in his home state.

D. Requiring a Particularized Showing of Bias

Mr. Markman also suggested conditioning access to federal courts in diversity cases upon a particularized showing of actual bias in the state courts against out-of-state litigants. This approach would be consistent with other judicial remedies for bias. For example, in both the federal and state courts, the abstract possibility of bias is not sufficient to justify a change of venue; instead, an actual danger of bias in the initial forum must be demonstrated. Under this approach to diversity jurisdiction, litigants would retain access to the federal forum, but only when they demonstrate that they would be denied an impartial trier or tribunal because of local bias.

E. Eliminating Diversity for Certain Classes of Cases

The diversity caseload of the federal courts could also be reduced by eliminating such jurisdiction for whole classes of cases that state courts have been able to handle without any evidence of bias or unfairness. [10] Such cases could be totally eliminated, just as other significant classes of diversity cases -- such as domestic relations, [11] probate, [12] and state workers' compensation [13] cases -- are now excluded from the federal courts' original or removal diversity jurisdiction.

Mr. Markman mentioned automobile accident cases as one possible type of additional exclusion from the federal courts' diversity exclusion. Automobile accident cases constituted 6,634 out of the 63,672 diversity cases filed during fiscal year 1986. [14] Many of these cases were actually between competing insurance companies, rather than the parties involved in the accident. Excluding automobile accident cases would have reduced the diversity case load by over 10 percent. While this number may not seem large, it is, in Judge Friendly's words, "too many for courts overburdened with peculiarly federal tasks, when state judges, familiar with applicable state law, can handle them sufficiently well." [15]

A more far-reaching reform would be the exclusion of all personal injury claims from diversity jurisdiction. In fiscal year 1986, 26,224 of the 63,672 diversity cases filed, or over 41 percent, were personal injury claims. More significant, of the 4,706 diversity cases that concluded after reaching trial in 1986, 2,341, or 50 percent, were personal injury cases; [16/] of the 3,080 diversity cases concluded after reaching a jury trial, 1,870, or over 60 percent, were personal injury cases. [17/]

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[10] See Meador, A New Approach to Limiting Diversity, 46 A.B.A.J. 383 (1960).

[11] In re Burrus, 136 U.S. 586, 593-94 (1890); Barber v. Barber, 62 U.S. (21 How.) 582 (1859).

[12] See Note, Federal Jurisdiction in Matters Relating to Probate and Administration. 43 Harv. L. Rev. 462 (1930).

[13] 28 U.S.C. § 1445(c) (1982).

[14] Annual Report of the Director of the Administrative Office of the United States Courts 1986, at 175-76 (Table C2).

[15] H. Friendly, supra, at 137.

As Professor Meador has pointed out, "[o]f all disputes now being handled on diversity grounds, tort actions for personal injury are perhaps the most 'local' in nature and have the least national or interstate impact." [18/] The suits are generally based on a discrete local occurrence; witnesses and evidence are usually available in the locality; and in most instances there is not a pertinent commercial transaction crossing state lines. [19/]

F. Mandatory Arbitration of Diversity Claims

In connection with the mandatory arbitration proposals of S. 1482 and H.R. 3152, Congress might consider granting district courts with existing arbitration programs the power to require arbitration for all or most of their diversity cases. Trial de novo would continue to be available under the same conditions as for other cases subject to mandatory arbitration. It is likely that a large portion of diversity cases could be settled or resolved through such mandatory arbitration, with a reduced drain on the court's resources.

G. Other Potential Reforms

Two other potential reforms not mentioned specifically by Mr. Markman include requiring the federal courts to abstain in diversity cases where the same matters are being considered in state court, and making appellate review of diversity cases discretionary. While the former proposal would not necessarily reduce the number of diversity filings, it would reduce the amount of judicial resources and time expended on diversity cases and demonstrate an appropriate deference to the state courts on state law issues. The latter proposal would reduce the diversity burden on the appellate courts, and allow the focusing on those issues and cases deemed of particular importance.

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[16/] Annual Report of the Director of the Administrative Office of the United States Courts 1986, at 207 (Table C4).

[17/] Id.

[18/] Meador, supra, at 384.

[19/] Id.

We appreciate the opportunity more fully to explain our position on diversity jurisdiction and to participate in the legislative process.

Sincerely,

Jack E. Perkins for
Thomas M. Boyd
Acting Assistant Attorney General

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

11 JUN 1984

Honorable Robert W. Kastenmeier
Chairman
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
Committee on the Judiciary
House of Representatives
Washington, D. C. 20515

Dear Chairman Kastenmeier:

This is in response to your request for the views of the Department of Justice on H.R. 3689, 3690, 3691, 3692, and 3693, bills relating to the diversity jurisdiction of the federal courts. H.R. 3689 proposes the complete abolition of federal jurisdiction based on diversity of state citizenship, except for statutory interpleader; the remaining bills set out intermediate reform options. The Department of Justice supports the enactment of the complete abolition proposal of H.R. 3689 without qualification. We would also support the enactment of the general types of reforms proposed in the other bills as preferable alternatives to the current system.

Our views concerning the grounds for abolishing diversity jurisdiction -- or limiting it as far as possible if complete abolition cannot be achieved -- have been stated in previous submissions to this Subcommittee. 1/ This report will accordingly be concerned, for the most part, with an analysis of the design and probable effects of the various reform options. A final section sets out some additional options that merit consideration by the Subcommittee.

1/ *See Diversity of Citizenship Jurisdiction - 1982*: Hearing on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 7-16 (1982) (testimony and supplementary submission of Assistant Attorney General Jonathan C. Rose) [hereafter cited as "1982 House Diversity Jurisdiction Hearing"].

I. H.R. 3689 -- The "Complete Abolition" Proposal

H.R. 3689 would generally abolish the diversity jurisdiction of the federal courts. The grounds for this reform have been discussed in our earlier statements and in the voluminous hearings on diversity jurisdiction reform that have been held in both Houses of Congress over the past six years. 2/

H.R. 3689, like earlier "complete abolition" proposals, would retain statutory interpleader. In contrast to the general diversity jurisdiction of the federal courts, the interpleader action serves a valid purpose. It permits a dispositive adjudication of liability with respect to a fund where multiple liability might otherwise result from inconsistent verdicts in proceedings in different states. 3/

H.R. 3689 differs from earlier "complete abolition" bills in providing that its elimination of diversity jurisdiction is to lapse after five years. This provision is not intrinsically desirable, since it risks a repetition a few years from now of

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2/ See id.; Diversity of Citizenship Jurisdiction/Magistrates Reform - 1979: Hearings on H.R. 1046 and H.R. 2202 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) [hereafter cited as "1979 House Diversity Jurisdiction Hearings"]; Jurisdictional Amendments Act of 1979, S. 679: Hearings Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) [hereafter cited as "1979 Senate Diversity Jurisdiction Hearings"]; Federal Diversity of Citizenship Jurisdiction: Hearings on S. 2094, S. 2389 and H.R. 9622 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. (1978) [hereafter cited as "1978 Senate Diversity Jurisdiction Hearings"]; Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) [hereafter cited as "1977 House Diversity Jurisdiction Hearings"].

3/ Outside of interpleader cases, diversity jurisdiction does not generally promote the efficient and consistent adjudication of related cases; it can easily have the opposite effect. Specifically, cases which would have been handled as consolidated proceedings in state court may be split into separate state and federal proceedings when some parties choose to litigate in federal court and other parties must stay in state court because they lack the requisite diversity of citizenship.

the battle over diversity reform. We therefore support this proposal, but would prefer that diversity jurisdiction be abolished on a permanent basis.

II. H.R. 3690 -- Abolition of General Diversity Jurisdiction And Creation of a Mass Tort Action

H.R. 3690 would abolish the general diversity jurisdiction of the federal courts in the same manner as H.R. 3689 and would provide a federal forum for certain multiparty or mass tort cases on the basis of minimum diversity.

We have previously stated support for the creation of this type of multiparty action. 4/ As an isolated measure, this proposal might be criticized as adding to the workload of a judicial system that is already heavily overloaded. However, this objection has little force against the adoption of the proposal as an element in a broader program of diversity jurisdiction reduction. The savings from H.R. 3690's general abolition of diversity jurisdiction, in particular, would vastly exceed any additional work resulting from the creation of a properly designed multiparty action. 5/

The proposed action would provide a more efficient means of adjudicating mass disaster or mass tort cases, such as those arising from airplane crashes. The existing diversity jurisdiction of the federal courts does not ensure that a consolidated forum will be available in such cases, since the multiplicity of parties makes it likely that some of the parties will lack the required diversity of citizenship. 6/ The proposed multiparty action based on minimum diversity avoids this problem. 7/ As a

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4/ See 1982 House Diversity Jurisdiction Hearing, supra note 1, at 11-13, 15-16.

5/ Diversity cases account for about one quarter of all civil filings, 40% of all civil trials, and 60% of all civil jury trials in the federal district courts.

6/ See, e.g., Air Disaster Litigation: Hearings on H.R. 1027 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 97th Cong., 1st & 2d Sess. 43-44 (1982)(110 unresolved cases arising from plane crash remained in state court on account of lack of diversity)[hereafter cited as "Air Disaster Litigation Hearings"].

7/ The proposal of H.R. 3690 also avoids the limitation of the general authority of the Panel on Multidistrict Litigation to consolidation of proceedings for pre-trial purposes. The (Footnote Continued) practical matter, the creation of this action offers an advantage to some potential litigants that may help offset resistance to diversity reform.

The formulation of the multiparty action contained in H.R. 3690 was initially proposed by the Department of Justice in 1979. 8/ It is generally well designed to achieve its purposes. A federal forum would be available on the basis of minimum diversity 9/ where at least twenty-five people have each incurred injury to their persons or property exceeding $10,000 as the result of a "single event, transaction, occurrence, or course of conduct." 10/ Once such an action had been commenced in federal

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(Footnote Continued)
court to which cases are transferred for consolidated pre-trial proceedings may, as a practical matter, sometimes retain them for trial as well, but this possibility is limited by venue rules. See 1979 House Diversity Jurisdiction Hearings, supra note 2, at 161.

8/ See id. at 158-62.

9/ Both the original version of the proposal and H.R. 3690 add some limited requirements to the minimum diversity standard, so as to exclude cases of a "purely local" nature. See id. at 160. The original proposal limited the action to cases in which (i) minimum diversity between adverse parties exists and in addition a plaintiff and some other injured party are citizens of different states, or (ii) a party is a state citizen and an adverse party is a foreign state or a citizen of a foreign state. This bill adds a third clause covering cases in which minimum diversity between adverse parties exists and in addition at least two defendants reside in different states. In the formulation of this new clause it would be preferable to use the notion of "citizenship" instead of "residence," since these concepts are not technically the same and the notion of "residence" might be unclear as applied to corporations.

10/ The bill differs slightly from the original version of the multiparty action proposed by the Department of Justice, see id. at 158, in requiring a "good faith" allegation concerning these jurisdictional conditions. This is apparently meant to convey that the good faith-legal certainty test that is normally applied to jurisdictional amount claims, see note 27 and accompanying text infra, would also apply in the proposed multiparty action. However, this test is not indicated by explicit language in other jurisdictional amount provisions; the term "good faith" is not a fully satisfactory formulation since the
(Footnote Continued)

court, other injured parties could intervene as additional plaintiffs, and the defendant could remove to federal court all related cases brought against it in state court.

The Panel on Multidistrict Litigation would be authorized to transfer all of the actions to a single district court (the "transferee court") for consolidated pre-trial proceedings and a consolidated trial on the question of liability. Actions would be remanded to their district courts of origin for separate trials on the question of damages, unless the equities of the case favored having the transferee court make the damage determinations as well. The transferee court would not be bound by normal choice of law rules, but would apply the same substantive law in all actions.

While we generally approve of the design of the proposed action, we have comments on a few points which merit further consideration by the Subcommittee. These are generally directed at minimizing the need for litigation on questions of interpretation; ensuring that the proposed action has a predictable scope; and ensuring that it operates efficiently:

The Definition of Injury. The action would be predicated on "personal injury or injury to the property" of at least twenty-five persons. It would be desirable to clarify in the proposal's legislative history that "personal injury" means physical harm to natural persons (including death) and that "injury to property" means physical damage to, or destruction of, tangible property.

This interpretation is consistent with the natural understanding of the language of the proposal and with the intent suggested by its legislative history. 11/ It would foreclose interpretive litigation over the adequacy of intangible "injury" as a basis for jurisdiction under the action, such as the financial loss or harm involved in fraud or breach of contract cases. In terms of policy, there is little justification for extending the scope of the action to such cases. The commercial

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(Footnote Continued)
normal standard allows dismissal where it is legally certain that the jurisdictional amount cannot be recovered, even in the absence of subjective bad faith; and the language of the bill appears to apply its "good faith" requirement to the allegation concerning the number of persons injured rather than to the allegation concerning the value of their injuries. It might be preferable to address this question by stating in legislative history that the normal standards for assessing jurisdictional claims would apply, rather than through a formulation incorporated in the language of the bill.

11/ *See* note 12 *infra*.

torts that most commonly result in financial harm to a large number of parties in a number of states -- such as antitrust violations and securities frauds -- can already be sued on in federal court on other jurisdictional bases.

Qualifying Events and Occurrences. The proposal refers to injury resulting from a "single event, transaction, occurrence, or course of conduct." It is clear both from the language of the proposal and from its legislative history that the action is meant to apply to mass injury cases arising from discrete, spatially and temporally limited incidents, such as an airplane crash, a train derailment, or a hotel fire. 12/ The term "course of conduct," however, creates an ambiguity as to what other classes of cases may also fall within the scope of the action:

> Example: In the years following World War II, employees at a shipyard are exposed to asbestos in the course of their work. After a lapse of decades, some of the former employees of the shipyard become sick, which they believe to be the result of their exposure to asbestos. They attempt to bring federal multiparty actions, arguing that the employer's failure to take adequate precautions against asbestos exposure over a period of years constituted "a single...course of conduct."

The number of straightforward mass disaster cases, exemplified by major commercial aviation accidents, is limited;

12/ In testimony before the Senate Judiciary Committee in 1979, the Department of Justice stated that the point of a multiparty action of the sort proposed in H.R. 3690 would be to address "mass tort" cases. It was stated that "[t]he most common example is the commercial airline crash; however, there are other types of mass injury cases that would also be affected such as bus or train accidents." See 1979 Senate Diversity Jurisdiction Hearings, supra note 2, at 31-32.

Similarly, in testimony before this Subcommittee explaining the possible desirability of creating a special action for "mass tort" cases, the Department stated that "[a]nother possible situation in which the diversity jurisdiction could serve some genuinely useful purpose today is in so-called 'mass tort' situations. A typical example is an airline crash where dozens or even 200 or 300 persons are injured or killed...." See 1979 House Diversity Jurisdiction Hearings, supra note 2, at 148. The Department's statement accompanying the initial proposal of the multiparty action contained in H.R. 3690 consistently referred to injuries resulting from a single "incident." See id. at 160.

admitting such cases to the federal courts on a "minimum diversity" basis should result in no excessive burdens for the courts if it is accompanied by the elimination of the general diversity jurisdiction. However, the effect of including a vaguely defined class of mass injury cases arising from more diffuse patterns of actions or occurrences is more difficult to anticipate.

While it is dubious that such cases were meant to be within the scope of the proposed multiparty action, under the current formulation of the proposal a large potential exists for litigation over how far the notion of "a single...course of conduct" can be stretched. As a matter of policy, it is not apparent that a federal judicial remedy designed primarily for aviation disasters and other cases of a similar character would be a suitable or adequate means of dealing with other types of mass injury litigation. 13/

13/ Consider, for example, mass injury cases in which thousands of suits may be commenced against the same defendant over a period of years or decades. Mechanisms may be desired in such cases -- such as permanent compensation funds -- which ensure that earlier litigants do not deplete the assets of the defendant, leaving little or nothing for plaintiffs who discover their injuries and commence litigation at a later time.

The multiparty action proposed in H.R. 3690 makes no provision for the interests of parties who have not commenced litigation at the time the consolidated proceeding is concluded in the transferee court. This omission is not a problem for aviation cases and other mass disaster cases in which the injury is immediately apparent and litigation is generally commenced promptly after the incident. It would have very different implications, however, in connection with asbestos litigation and other litigation of a similar character. *See generally* *The Manville Bankruptcy and the Northern Pipeline Decision*: Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982); *Court Improvements Act of 1983*: Hearings on S. 645 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 183-84 (1983); Rotbart, *Manville Corporation Faces Increasing Opposition to Bankruptcy Filing*, Wall St. J., Jan. 31, 1984, at 1.

The simplest response to these problems would be to delete the terms "course of conduct" and "transaction" 14/ from the bill. This would preserve the action for all cases that are clearly within its intended scope -- mass injury actions resulting from a single event or occurrence -- but would foreclose litigation over its possible application in broader areas. Defining the particular action proposed in H.R. 3690 in this manner would not, of course, prevent the Subcommittee from examining the problems of other types of mass injury litigation as a separate undertaking from diversity jurisdiction reform.

Transferable Actions. The bill's provision regarding transfer and consolidation, 28 U.S.C. § 1407(i), refers to transferred actions in which jurisdiction is based on the proposed multiparty action, 28 U.S.C. § 1367. This should be broadened to refer to all actions based on an event or occurrence which provides the jurisdictional basis for a multiparty action. If some suits arising from a mass disaster are brought in federal court under proposed § 1367, while other suits arising from the same incident are brought under other jurisdictional bases, such as the general alienage jurisdiction, 15/ it should still be possible to handle all of the actions under the consolidated procedure proposed in the bill. The bill's current language is not adequate for this purpose.

14/ While the term "course of conduct" carries the greater expansive potential, deletion of the term "transaction" also seems advisable, unless some specific class of cases within the intended scope of the action can be described which would be included if "transaction" were retained and excluded if "transaction" were taken out. In general, it is unclear what "transaction" adds to the unproblematic terms "event" and "occurrence."

15/ H.R. 3690 would retain the general alienage jurisdiction which is currently provided in 28 U.S.C. §1332(a)(2). In a suit qualifying as a multiparty action which involved adverse parties who were American citizens and citizens of foreign states respectively, there would apparently be the option of proceeding under the general alienage jurisdiction provision, or the proposed multiparty action, or both.

There are various other potentially overlapping grounds of federal jurisdiction. For example, the sinking of a ship that gives rise to a multiparty action may also give rise to Jones Act suits, see 46 U.S.C. §688, to Death on the High Seas Act suits, see 46 U.S.C. §§761-68, and to general admiralty jurisdiction suits, see 28 U.S.C. §1333. Aviation disasters often involve claims against the government under the Federal Tort Claims Act. See Douglas, Air Disaster

(Footnote Continued)

Choice of Law. Under currently popular choice of law theories, the law of different jurisdictions may be applied to different parties in the same case on account of differences in their domiciles or other factors. The choice of law may also differ for the various elements in a single party's case. For example, the law of different jurisdictions may be applied in connection with the applicable standard of care and other rules of liability, presumptions and burdens of proof, rules of contributory or comparative negligence, the amounts and types of compensatory damages that may be awarded, the availability of punitive damages, rules governing contribution among joint tortfeasors, and the limitation period applicable to the action.

This fragmentation of the substantive law applied in a case has had unfortunate consequences in mass disaster cases of the sort addressed by H.R. 3690, which involve dozens of parties from a number of states. Specific problems that have arisen include choice of law litigation of staggering complexity 16/; complications in the adjudication of the merits of the case resulting from the need to apply different bodies of law to different parties 17/ and different issues 18/; delay in settlements resulting from uncertainty over which state's law will be applied 19/; the impetus to forum-shopping created by the perception that a particular forum will apply a more or less favorable body of law 20/; and the perceived unfairness of drastically different recoveries 21/ that may result when different bodies of law are applied to different parties in the same case. 22/

(Footnote Continued)
Litigation Without Diversity, 45 J. Air L. & Comm. 411, 438-39 (1980).

16/ See, e.g., In re Air Crash Disaster Near Chicago, 644 F.2d 594 (7th Cir. 1981).

17/ See Air Disaster Litigation Hearings, supra note 6, at 38.

18/ See id. at 77.

19/ See id. at 104-05.

20/ See id. at 106-07.

21/ See id. at 40, 78, 102.

22/ It is not apparent what there is to show for all the time and effort that is expended as a result of choice of law problems in these cases. It is a debatable proposition that the tort law of one state is better or more just than the law of some other state that might be applied, and in any
(Footnote Continued)

H.R. 3690 provides that the transferee court would not be bound by normal choice of law rules, but would apply the same substantive law 23/ in all actions. This would eliminate the application of the law of different jurisdictions to different parties. With appropriate clarification, it would also go far toward eliminating the other problems related to choice of law in mass tort cases. Specifically, it should be made clear that the application of the same substantive law to all actions includes a requirement that the same law generally be applied to all aspects and elements of each party's action, and that the transferee court's choice of law would carry over to the district courts of origin in remands for separate trials on the question of damages. This approach would not avoid the need for a choice of law by the transferee court, but only one choice would be required. Following this choice, the same body of law would be applied uniformly in all subsequent proceedings. 24/

(Footnote Continued)
event few courts employ choice of law rules that make the applicable law depend on such value judgments. There must be some limit on the costs justified by determinations that have nothing to do with the merits of the case and further no interest of justice.

23/ "Substantive law" should be understood in the normal choice-of-law sense. It does not include the choice-of-law rules of the state and does not include matters that are purely procedural, that is, the range of matters governed by the Federal Rules of Civil Procedure and local rules of court in the federal courts.

24/ The suggested principle of uniformity requires some limited qualifications. If a claim or issue is governed by federal law, the transferee court should, of course, apply the pertinent federal law. For example, a multiparty action arising from a train derailment might incorporate Federal Employer's Liability Act (FELA) claims, see 45 U.S.C. §§51-60, and a multiparty action arising from the sinking of a ship might incorporate Jones Act claims, see 46 U.S.C. §688.

Where necessary to avoid unfair surprise, the standards of conduct provided by a state's law should be applied to conduct which does not have a potential impact outside of the state. For example, in a bus accident case, the driver's negligence must obviously be reckoned in light of the speed limit and other rules of the road of the place in which he was driving, even if some other state's law is generally applied in the case. See Reese, Depecage: A Common Phenomenon in Choice of Law, 73 Colum. L. Rev. 58, 63-64 (1973). On the other hand, there would be no unfairness in applying the law of the state chosen,
(Footnote Continued)

As an alternative to providing for the uniform application of the law of a single, unspecified jurisdiction in all actions -- the approach of the current formulation of the bill -- the Subcommittee might consider the possibility of including an explicit choice of law rule in the bill. The bill could, for example, state a general rule that the substantive law of the state in which the transferee court is located is to be applied. 25/ This would provide uniformity and optimal simplicity in the choice of law, and would utilize the body of state law with which the judge of the transferee court is most likely to be familiar. The Panel on Multidistrict Litigation would be required, in any event, to make a decision concerning the district in which the actions are to be consolidated. Many

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(Footnote Continued)
whichever it might be, in reckoning the liability of a manufacturer for a defective part incorporated into an airplane which may be flown in other states.

It may also be desirable to state some qualification to ensure that the normal operation of state workmen's compensation systems -- and other state compulsory insurance systems adopted as a replacement for litigation -- will not be interfered with, where the state whose law is generally applied in the case is not the state which administers the applicable compensation system. Cf. 28 U.S.C. § 1445(c) (civil action in state court arising under state's workmen's compensation laws not removable to federal court).

While this question merits consideration by the Subcommittee, it would appear that applying the same state's law to all issues would rarely present any problem in connection with the issues that are likely to pose significant choice of law questions in mass tort cases. See generally Air Disaster Litigation Hearings, supra note 7, at 75-78; Douglas, supra note 15, at 424 (1980); Craig & Alexander, Wrongful Death in Aviation and the Admiralty: Problems of Federalism, Tempests and Teapots, 37 J. Air. L. & Comm. 3, 9-10 & nn. 24-28 (1971). The few warranted exceptions could be articulated in the proposal's legislative history.

25/ This approach would also be subject to the limited qualifications noted in note 24 supra.

Cf. To Amend Title 28, United States Code, Federal Court Procedures with Respect to Aviation Activity: Oversight Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 77 (1983) (suggested stipulation of jurisdiction-selecting rule for air disaster cases, such as law of the place of departure).

of the considerations that support the transfer of actions to a district in a particular state -- such as the occurrence of the event on which the action is based in the state, or a concentration of parties' domiciles in the state -- also tend to support the application of the law of that state.

III. H.R. 3691 -- Increasing the Jurisdictional Amount and Providing for Abstention in Certain Cases

H.R. 3691 incorporates two distinct reform proposals -- it would raise the amount-in-controversy requirement from $10,000 to $100,000, and it would provide for abstention in favor of state proceedings under certain circumstances.

The Amount-in-Controversy Requirement. There is no reason in principle why diversity cases involving larger liabilities should not be heard in state court. However, raising the jurisdictional amount is one means of reducing the volume of diversity cases in the federal courts which may be less strongly resisted than the complete abolition approach. H.R. 3691's proposal for raising the amount to $100,000 would be a step in the right direction. 26/

The Subcommittee should consider some additional measures that would enhance the effectiveness of this type of reform:

The proposed figure of $100,000 may appear to set a high threshold, but it does not actually do so, since plaintiffs' attorneys commonly allege damages which are many times greater than any recovery that can realistically be expected. Raising the jurisdictional amount to $100,000 would not even have the effect of excluding completely the class of cases in which damages below $100,000 are now claimed, since in the presence of a higher jurisdictional threshold some claims would be inflated so as to exceed this threshold.

26/ The amount in controversy requirement for diversity cases has been raised a number of times in the past. It was initially set at $500 by the First Judiciary Act in 1789. It was raised to $2,000 in 1887, to $3,000 in 1911, and to $10,000 in 1958.

The Consumer Price Index tables prepared by the Bureau of Labor Statistics of the Department of Labor show that 10,000 1958 dollars would be worth about $35,000 today as a result of inflation. Raising the jurisdictional amount to $35,000 would accordingly do no more than conform 28 U.S.C. §1332(a) to Congress's judgment concerning the proper amount at the time of its enactment. The figure of $3,000 set in 1911 would similarly be equivalent to about $32,500 today as a result of inflation.

There is not, at present, any meaningful deterrent to this type of inflation of claims. Dismissal of a facially adequate claim for failure to satisfy the jurisdictional amount requirement depends on a "legal certainty" test that is rarely satisfied. 27/ Section 1332(b) of the Judicial Code provides that costs may be denied to and imposed on the plaintiff if the jurisdictional amount is not ultimately recovered, but this sanction has been undermined by narrowing construction 28/ and "costs" in the pertinent sense are limited to the narrow range of expenses described in section 1920 of the Judicial Code.

The Subcommittee might consider two modifications of the bill in response to these problems. First, the new jurisdictional amount could be set at some higher figure than $100,000, such as $250,000 or $1,000,000. Second, the sanction of section 1332(b) could be strengthened by making it mandatory whenever the jurisdictional amount is not in fact recovered and by providing a definition of "costs" that more fully captures the true cost to the government of carrying out the adjudication of a diversity case.

Abstention. H.R. 3691 also provides for staying a diversity case in favor of a state adjudication if certain conditions are satisfied. If a federal district court found that a state court had jurisdiction of all claims and parties, and that the state court could dispose of the claims in a timely manner, a two year stay of the federal proceedings would be required. If the action had not been concluded in the state court within the two-year period, the district court would be permitted to resume the federal proceeding, "if the interests of justice would be so served," upon motion of any party.

As the sponsor's statement notes, this approach would be "sensitive to the potential impact on State courts of a sudden shift in cases from Federal to State courts" since "decisions about when and whether to abstain would be made on the local level." 29/ Since some of the opposition to diversity reform reflects concerns over its effect on particular state systems, approaches that permit local variation are worth exploring as the basis for a possible compromise or accommodation. The specific approach proposed in H.R. 3691 does, however, present some problems or concerns.

27/ See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3702 (1976).

28/ See id. at 402.

29/ 129 Cong. Rec. H6023 (July 29, 1983).

The maximum stay of federal proceedings required by the bill is two years; if the case had not been disposed of in state court within that time, the federal proceeding could resume. The disposition time for a case is not, however, independent of the choices of the parties. In most cases it depends primarily on how long it takes the parties to decide to settle and to reach agreement on the terms of settlement. Even in tried cases the duration of the litigation may depend to a large extent on the decisions of the parties, including the inclination of a party to resort to the familiar tactics of delay. The system proposed in the bill would give a party who preferred a federal forum an incentive to stall in the state proceedings so that the two-year period would elapse and continuation of the federal proceeding could be sought.

The proposal also presents the potential for arbitrary discrepancies in the treatment of different cases and litigants. Resumption of the federal proceeding after two years would not be mandatory, but would depend on the district court's judgment that taking back the case would serve the interests of justice. The "interests of justice" language provides no real guidance, so the decision to resume federal proceedings might largely depend, as a practical matter, on how busy the responsible district judge is with other cases, what his general attitude is towards diversity cases, and how interesting he finds the particular case. A similar potential for arbitrariness is presented by the bill's conditioning of abstention on a district judge's judgment that the action can be disposed of in state court "in a timely manner."

The Subcommittee may wish to consider other approaches that would permit variations responsive to local conditions but would not involve comparable risks of manipulation or arbitrariness. One possibility would be to authorize the judicial councils of the circuits to adopt rules governing abstention in diversity cases for the districts in their circuits, subject to a final coordinating authority in the Judicial Conference. This would permit the adoption of rules suited to the conditions in particular districts, and would provide coordinating mechanisms at both the circuit level and the national level which would be capable of addressing problems of forum-shopping and other difficulties that might otherwise result from the application of different abstention rules in different courts. 30/ The suggested approach

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30/ In this respect the suggested approach avoids a problem with the proposal of Professor David Shapiro that the individual district courts be allowed to decide whether to retain diversity jurisdiction. *See* Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 Harv. L. Rev. 317, 339-55 (1977). It is also preferable in that it commits the
(Footnote Continued)

may be compared to that of Title III of H.R. 6872 of the 97th Congress, which would permit the circuit councils to adopt expediting or priority rules for civil cases, subject to a coordinating authority in the Judicial Conference. 31/

IV. H.R. 3692 -- An Increase in the Jurisdictional Amount and Compulsory Arbitration

H.R. 3692 would raise the amount-in-controversy requirement for diversity cases to $100,000 and would require that diversity cases be submitted to arbitration. The arbitration would be carried out pursuant to rules issued by the Judicial Conference, and would normally have to be completed within a year. Trial de novo could be obtained following arbitration, but if the party seeking a trial obtained a substantially less favorable result from the judgment of the court than from the arbitration, that party would be required to pay the opposing party the full expense of the litigation, including attorney's fees. 32/

Our remarks concerning the proposal in H.R. 3691 to raise the jurisdictional amount to $100,000 are equally applicable to the corresponding proposal in this bill. The arbitration proposal raises both questions of design and questions of basic approach:

Questions of Design. The bill contains few specifications concerning the arbitration system, leaving most matters to be decided by the Judicial Conference. This approach makes the actual operation of the system unpredictable to some extent. It does, however, have the practical advantage of avoiding the need to reach agreement on the details of the system at the legislative stage. It would also make adjustments in the system in light of experience with its operation easier to implement than an approach in which significant changes would normally require new legislation.

(Footnote Continued)
decision to bodies -- the circuit councils and the Judicial Conference -- which include both circuit and district judges. Since the intake of diversity cases at the district court level has a large effect on the workload of the courts of appeals, see note 53 infra, it is appropriate to have circuit judges as well as district judges involved in such a decision.

31/ See H.R. Rep. No. 824, 97th Cong., 2d Sess. 17 (1982).

32/ For purposes of valuating fees and expenses, the bill incorporates by reference the provisions of the Equal Access to Justice Act.

The bill provides that the limitation period applicable to an action would generally be suspended while arbitration was going on, but would start to run again when the arbitration was completed or one year after the start of the arbitration, whichever was earlier. This is problematic in a case in which the arbitration continues beyond a year because of unnecessary delay by the defendant. The limitation period would begin to run again against the plaintiff, who might be forced to choose between seeking trial de novo despite the fact that the arbitration was still going on, or foregoing the possibility of trial de novo as a result of the expiration of the limitation period.

An amendment is needed to ensure that a party would not be prejudiced or forced to make an undesired choice on account of delay attributable to the other party. The bill is obviously correct in suspending the general limitation period applicable to an action when it is submitted to arbitration, but restarting such a period subsequently would not be necessary if the arbitration rules specified suitable time limits for completing arbitration and seeking trial de novo. 33/

The bill provides for fee-shifting against a party who seeks trial de novo if the result of the trial is substantially less favorable than the arbitral award. Under current law, there are a broad variety of rules and statutes which require that other remedies be pursued before a federal judicial forum is sought. 34/

33/ Restarting a statutory limitation period after a certain time is not, in any event, an effective means of controlling delay during arbitration or after it, since many years may remain prior to the expiration of such a period. Delay by either party could be effectively controlled through the Judicial Conference's prescription of time limits for completion of the various stages of arbitration and for seeking trial de novo following the conclusion of arbitration. The rules of the three federal district courts that have utilized arbitration do include such time limits and provide that the arbitral decision becomes final if trial de novo is not sought within the time allowed. See E.A. Lind & J.E. Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts 99-118 (Federal Judicial Center 1983).

34/ For example, under the Federal Tort Claims Act, a claim must first be presented to the responsible agency. See 28 U.S.C. § 2675. Employment discrimination claims must be presented to the EEOC for conciliation as provided in 42 U.S.C. § 2000e-5. State judicial remedies must be exhausted before a state prisoner can apply for federal habeas corpus. See 28 U.S.C. § 2254(b). Under the Civil Rights of
(Footnote Continued)

There are also many provisions that require a party who has proceeded to litigation without necessity or adequate justification to bear the resulting costs and expenses, where "necessity" and "justification" are either the subject of an express judicial determination or are defined in terms of the outcome of the case. 35/ In the circumstances in which H.R. 3692 authorizes fee-shifting -- a substantially less favorable verdict than the arbitral award -- the outcome of the litigation demonstrates that proceeding to trial was not necessary to secure the compensation to which the party who sought a trial was entitled, since he would actually have done better if he had accepted the arbitral award. Requiring that party to bear the other party's expenses in such circumstances is similar in principle to the existing cost and fee-shifting provisions noted above.

While we see no problem in principle with this provision, the conditioning of fee-shifting on a "substantially less favorable" outcome introduces an element of vagueness -- and an

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(Footnote Continued)
Institutionalized Persons Act, suits by prisoners under 42 U.S.C. § 1983 may be stayed up to 90 days while the plaintiff pursues state administrative remedies conforming to federal standards. See 42 U.S.C. § 1997e.

35/ For example, "costs," as defined in 28 U.S.C. § 1920, are normally included in a judgment against a party in a federal case. Costs may be shifted to the plaintiff in a diversity case if he fails to recover the jurisdictional amount. See 28 U.S.C. § 1332(b). Under 28 U.S.C. § 1912 an appellate court "may adjudge to the prevailing party just damages for his delay, and single or double costs" when a judgment is affirmed on appeal.

There are dozens of rules and statutes that authorize awards of attorney's fees, either generally or under certain conditions. For example, attorney's fees may be awarded in any case against a party who proceeds in bad faith. The Equal Access to Justice Act makes the government liable for attorney's fees to prevailing parties in civil actions not sounding in tort, unless the government's position is substantially justified or certain other exceptions apply. See 28 U.S.C. § 2412. Under 42 U.S.C. § 1983 and the other statutes specified in 42 U.S.C. § 1988, a prevailing plaintiff is normally awarded attorney's fees and a prevailing defendant is awarded attorney's fees if the suit was frivolous, harassing, or vexatious. 42 U.S.C. § 2000e-5(k) generally authorizes awards of attorney's fees to prevailing parties in employment discrimination cases. 28 U.S.C. § 1875(d)(2) authorizes fee-shifting in favor of a juror who successfully sues an employer for discrimination based on jury service.

attendant likelihood of interpretive litigation -- which serves no obvious purpose. If the outcome of the trial is the same as the arbitral award or less favorable than the arbitral award to any degree, it appears that the recourse to litigation was unnecessary to secure the compensation to which the party who sought a trial was entitled, and the basic rationale for fee-shifting is applicable. It would be preferable to provide for fee-shifting whenever the outcome of the trial is not more favorable than the arbitral award, rather than when it is "substantially less favorable." 36/

Questions of Basic Approach. The more basic question for the Subcommittee to consider is whether requiring arbitration for all diversity cases in all parts of the country is too large a step to take at one time. The available evidence concerning the effects of arbitration consists of experiments in three federal districts which have gone on for a number of years, 37/ and a larger body of experience with arbitration in state systems. 38/ If a uniform arbitration requirement seems excessive at this time, the Subcommittee may wish to consider a more flexible approach under which the circuit councils would be given authority to require arbitration of diversity cases in the districts in their circuits, subject to a coordinating authority in the Judicial Conference. 39/ This would enable the workload resulting from diversity cases to be reduced in districts in which arbitration proved to be productive, and would provide a larger body of experience that would inform future legislative decisions concerning the use of arbitration in federal cases.

V. H.R. 3693 -- Limiting Access to a Federal Forum to Out-of-State Litigants

The final bill in the series is a classical intermediate reform option which was proposed by the American Law

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36/ Two federal district courts have used a "not more favorable" standard in their arbitration rules concerning cost-shifting as a sanction for unnecessary resort to trial. *See* E.A. Lind & J.E. Shapard, *supra* note 33, at 111, 118.

37/ *See generally id.*; Levin, *Court-Annexed Arbitration*, 16 U. Mich. J.L. Reform 537 (1983).

38/ *See generally* Levin, *supra* note 37.

39/ As noted earlier, *see* text accompanying note 31 *supra*, this is similar to the approach proposed for civil priority rules in H.R. 6872.

Institute 40/ and considered in the 95th Congress. 41/ It would limit filing in federal court in diversity cases to out-of-state litigants. In relation to the historical justification of diversity jurisdiction as a means of protecting parties from bias against persons from other states, there is no point in allowing a federal forum to be sought by an in-state litigant. Such a litigant could only benefit from local favoritism or partiality in state proceedings.

In relation to current law, H.R. 3693 would simply equalize the position of plaintiffs and defendants. Section 1441(b) of the Judicial Code now bars a defendant from removing a diversity case to federal court if he is sued in his home state, but a plaintiff is free to initiate a diversity suit in federal court in his home state.

The reform of H.R. 3693 would not reduce the federal diversity caseload by a proportion fully equal to the current proportion of cases brought into federal court by in-state litigants. Consider, for example, a case that under the current system would be brought in federal court by an in-state plaintiff. Under the reform the plaintiff would instead have to initiate the suit in state court, if he wished to litigate in his own state. This does not necessarily mean, however, that the litigation would be carried out in state court, since the defendant would retain the option of removing the case to federal court. Also, a plaintiff with the capacity to litigate in more than one state might deliberately choose to sue in some state other than his home state in order to have access to a federal forum. 42/ It is, nevertheless, reasonable to expect that the reduction in federal

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40/ See American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 123-25 (1969).

41/ See generally 1978 Senate Diversity Jurisdiction Hearings, supra note 2; 1977 House Diversity Jurisdiction Hearings, supra note 2.

42/ This possibility would be limited, however, by the difficulty of litigating out-of-state for many litigants, and by venue restrictions. Under the amendment to 28 U.S.C. § 1391(a) proposed in the bill, venue would be limited to districts in which all plaintiffs or all defendants reside, and districts containing a substantial part of the events giving rise to the claim or a substantial part of the property that is the subject of the action.

The potential for such forum-shopping could be further limited by confining access to a federal forum to cases in which at least one of the parties is litigating in his home state, as proposed in the ensuing textual discussion.

diversity cases resulting from the enactment of H.R. 3693 would be substantial.

We would recommend one improvement in the proposal -- the bill should provide that the party adverse to the party seeking a federal forum must be a citizen of the state in which the suit is brought. In the absence of such a limitation, a federal forum could be obtained where neither party was a citizen of the state in which the suit was brought. 43/ There is no point in retaining this option under the historical justification of diversity jurisdiction noted above, 44/ since bias against persons from other states in the forum state would not create a relative advantage for either party in a case in which both parties were not citizens of the forum state.

VI. Other Reform Options

A. Discretionary Appellate Review

The Subcommittee should consider a suggestion of Judge Carl McGowan of the D.C. Circuit that appellate review in diversity cases be made available only by leave of the courts of appeals. 45/ Diversity cases now account for about 15% of appeals from district court decisions; making appellate review discretionary would plausibly eliminate much of the burden that is currently imposed on the courts of appeals by these cases.

This reform would involve a departure from the normal rule that a litigant is afforded one appeal as a matter of right beyond the trial stage. However, the principal benefits provided by appellate review in other contexts -- correction of legal errors and maintenance of decisional uniformity -- are not realized in the normal manner in diversity cases.

Federal diversity jurisdiction, to begin with, involves transferring a class of state law cases from the state judges -- who have the greatest expertise and familiarity with this body of law -- to federal district judges, whose exposure to state law is more limited. The federal courts of appeals are further removed from the state systems whose law they are required to apply in diversity cases. A federal district judge often has had prior

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43/ This was not allowed between 1789 and 1875. Changes in the statutory language in 1875 abrogated the requirement that at least one party must be a citizen of the forum state.

44/ *I.e.*, protection from bias against persons from other states.

45/ *See* McGowan, *The View from an Inferior Court*, 19 San Diego L. Rev. 659, 666 (1982).

experience as a practitioner in the legal system of the state in which his district is located. The federal appellate circuits, however, generally extend over a number of states, so a circuit judge hearing a diversity appeal will most likely have no first-hand experience with the legal system of the state whose law is being applied in the case.

Diversity appeals accordingly subject the decisions of district judges, who have some degree of expertise on state law matters, to review for error by circuit judges, who have relatively little expertise in pertinent state law. Appellate review of this character is less likely to provide significant benefits in terms of increased accuracy than appellate review in normal federal cases which depend on the interpretation and application of federal law. 46/

Appellate review in diversity cases also does not operate in the normal manner to produce decisional uniformity. The federal courts of appeals have no authority to expound or develop state law, but are limited to serving as "ventriloquist's dummies" for the state courts in diversity cases; their decisions on state law issues do not, of course, have any binding effect on the courts of the states within the circuit. Moreover, a federal appellate decision on a state law issue has only provisional value in producing uniformity in the decisions of the district courts in later diversity cases in the circuit, since it loses effect if the state courts subsequently address the issue and reach a different conclusion. 47/

Hence, appellate review in federal diversity cases serves the normal functions of appellate review, at best, to a limited degree. It is dubious that the slight benefits that may result from making such review available as a matter of right justify the costs and burdens that result to the federal courts of

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46/ In other words, if an appellate panel reverses a district court judgment on federal law grounds, it is probable that the appellate panel is correct and the district court was mistaken. When an appellate panel reverses a district court judgment on state law grounds in a diversity case, however, it may be equally probable or more probable that the appellate panel is mistaken and the district judge was correct. If this is so, then appellate review of state law questions in diversity cases produces no net gain in terms of error correction, or may actually be counterproductive.

47/ See *American Institute of Chemical Engineers v. Reber-Friel Co.*, 682 F.2d 382, 392 (2d Cir. 1982)(Feinberg, C.J., concurring).

appeals. For diversity cases that incidentally present significant questions of federal law or procedure, discretionary review by the courts of appeals should be an adequate recourse. 48/

B. Requiring a Particularized Showing of Bias

The continuation of diversity jurisdiction is sometimes justified by reference to a supposed danger of bias in state proceedings against litigants from other states. Access to a federal forum in diversity cases might be conditioned on a showing that bias of this type would actually be encountered in state proceedings.

This approach would be consistent with that taken under other remedies for bias. In both the state and federal systems, for example, a purely abstract possibility of bias is not grounds for granting a change of venue; rather, an actual danger of bias in the initial venue must be established. Under the "local bias" rationale for retaining federal diversity jurisdiction, it is conceived of as a change-of-venue mechanism, by which cases are removed from a state jurisdiction to the federal jurisdiction as a response to possible bias against out-of-state litigants.

Given this conception, it is difficult to see why the showing of an actual danger of bias that is normally required for change of venue should be dispensed with. This approach could be implemented by requiring, as a condition for proceeding in federal court in diversity cases, a showing by a party that he would be denied an impartial trier or tribunal in state proceedings on account of bias against persons from other states, and that transferring the case to federal court would avoid such bias.

C. Redefining Corporate Citizenship

A final possibility would be to re-define the notion of state citizenship for corporations so that diversity of

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48/ Under this proposal it would not, of course, be necessary for each judge of a court of appeals to pass on an application for discretionary review. The courts of appeals would be free to adopt the more efficient procedure of delegating the screening function for discretionary review to a smaller number of judges, just as the function of deciding cases on the merits is now routinely delegated to three-judge panels. Cf. Fed. R. App. P. 22 (request to a circuit court for a certificate of probable cause, which is required as a prerequisite to appeal in habeas corpus proceedings, is to be considered by a circuit judge or judges as the court directs).

citizenship would be present in a smaller class of cases. This has been done in the past. State citizenship for corporations was initially defined as the state of incorporation. As a result of legislation adopted in 1958, however, a corporation is now also deemed a citizen of the state in which it has its principal place of business. 49/ Since most diversity cases involve corporate litigants, 50/ broadening the notion of state citizenship for corporations could have a significant effect on the volume of diversity cases.

It might, for example, be provided that a corporation is a citizen of any state in which it is licensed to do business. 51/ This approach seems consonant with the supposed function of diversity jurisdiction as a safeguard against bias against out-of-state parties. Under the stated condition, a corporation would be an in-state enterprise as well as an out-of-state enterprise -- even if its principal place of business and place of incorporation were elsewhere -- and would not obviously be more exposed to the possibility of local bias than other business operations in the state. 52/

49/ See 28 U.S.C. § 1332(c). As a result of legislation adopted in 1964, § 1332(c) further provides that, in a direct action against an insurer, the insurer is also deemed a citizen of the state of which the insured is a citizen.

50/ See 1978 Senate Diversity Jurisdiction Hearings, supra note 2, at 66 (one or both of the opposing parties is a corporation in over 75% of diversity cases).

51/ For discussion of other possible changes in the notion of corporate citizenship, see American Law Institute, supra note 40, at 125-29; Wright, Miller & Cooper, supra note 27, §3601 at 583 (proposal to bar federal forum where corporation doing business in state is sued on a claim arising from its activities in the state).

52/ Consider, for example, a case in which a citizen of Delaware sues a corporation which is incorporated in Delaware ("Corporation A") but does no business there, and an otherwise similar case in which a Delaware citizen sues a corporation ("Corporation B") which is not a citizen of Delaware as that notion is currently defined but which carries on substantial business in Delaware and employs many people in the state. If we assume -- as the "local bias" rationale for retaining diversity jurisdiction requires -- that people in Delaware are prejudiced against out-of-state businesses, it is apparent that Corporation A would be at greater risk on account of such prejudice than Corporation B, but the current rules would allow a federal forum in the
(Footnote Continued)

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In sum, the Department of Justice supports the general abolition of diversity jurisdiction proposed in H.R. 3689 and supports the intermediate reform options proposed or suggested by the remaining bills as discussed in this report.

The limitation or elimination of diversity jurisdiction is long overdue. No other pending reform is of comparable importance in relieving the overload of the federal judicial system 53/; no reform could be more appropriate as an adjustment of federal-state responsibilities under the principles of federalism. We commend the leadership you have shown on this issue and earnestly hope that this initiative will be met with a spirit of statesmanship and accommodation among other interested members of Congress.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General

(Footnote Continued)
suit against B but not A. The suggested re-definition of corporate citizenship would avoid such perverse results.

53/ As noted earlier, diversity cases account for about one-quarter of all civil filings, 40% of all civil trials, and 60% of all civil jury trials in the federal districts courts, and for about 15% of appeals from district court decisions. They take up over one-fifth of the total work time of federal district judges. *See* Federal Judicial Center, *Federal District Court Time Study* 15 (1979).

Senator HEFLIN. Next is Mr. Robert M. Landis of the American Bar Association, Philadelphia.

STATEMENT OF ROBERT M. LANDIS, AMERICAN BAR ASSOCIATION, PHILADELPHIA, PA

Mr. LANDIS. Good morning, Mr. Chairman. I am Robert Landis, a Philadelphia trial lawyer. I have tried cases in the State, and largely the Federal courts for about 40 years. I am here as a past chairman of the Standing Committee of the American Bar Association on Federal Judicial Improvements, which I served for 3 years and then continue as a member of the committee. That committee has the primary responsibility, as its name suggests, to study and examine and make recommendations to the House of Delegates of the ABA on improvements to the Federal judicial system.

We have submitted a statement generally on the bill and we certainly commend the chairman and the members of this committee for its concern about these improvements to the system of justice and the far-reaching effect that many of them will have.

I will only make a few comments about some aspects of the bill and then I will be pleased to submit to any questions you may have, Mr. Chairman.

First, on the mandatory jurisdiction of the Supreme Court, ever since 1979, through my committee and the American Bar Association, we have taken a position that that obligatory jurisdiction of the Supreme Court should be eliminated. While, in terms of numbers of cases, it does not represent a significant number of cases, in the 1983 term I think there were only about 210, still it does represent a needless diversion of the Supreme Court from the more significant constitutional responsibilities it has. It would not, and we emphasize this, in any way restrict access to the Supreme Court because the same kinds of routes by way of the certiorari jurisdiction would remain. So this is a very important provision of the bill, and we urge that it be carried forward.

Court-annexed arbitration is a matter of broad concern to the American Bar Association. While we have not specifically dealt with these provisions, we have historically supported this as an important aspect of litigation; namely, alternate dispute resolution. The proposal to extend this program to various other additional districts of the Federal system is highly important; we recommend it and I can speak specifically from experience because in the eastern district of Pennsylvania where my principal office is located, we have had court-annexed arbitration with a $100,000 jurisdictional limit for many years, following the pioneering that is taking place in the State courts of Pennsylvania. It is highly successful.

The litigants, the lawyers, and surely the judges, are quite satisfied with the way it is working out. The numbers of cases that are ultimately appealed for a de novo trial are modest. I think it is now in the low teens in terms of percentages. I am not exactly sure about that, but that is my recollection.

One other aspect of the arbitration provisions that I would like to comment on at this time, and that is section 616, which is the section which deals with appeals on cases involving arbitration. This would be done by amending the Arbitration Act in order to permit an appeal from the denial of an order staying proceedings pending arbitration or of an application to compel arbitration by changing the Arbitration Act in this respect, by permitting an appeal in that instance and by prohibiting an appeal where a stay pending arbitration has been granted. It would encourage arbitration and it would make some necessary changes in the act as it now exists.

As to judicial qualification, disqualification, in August of 1987, the House of Delegates adopted a resolution proposing this modification on automatic disqualification because it seems most improvident, a gross imposition on the system to compel a recusal for only a modest and, indeed, infintesim as possible conflict of interest. Unless there is some financial interest that would be substantially affected by the proceeding, we believe the court should have the power to waive it and that the parties should be asked to do that so that there should be no automatic recusal.

We also highly support section 614, which is the provision on judicial immunity, which would preclude an award of an attorney's fees against judges wherever there has been, or where there has been no award of monetary damages.

Senator **Helfin**. What is the position of the American Bar upon the injunctive relief?

Mr. **Landis**. We also support that. That is your Senate bill 1515, but we also would also support the immunity in the case of injunctive relief to reverse the effect of the Supreme Court's decision in the *Podium* case.

As to the Temporary Emergency Court of Appeals, a couple of years ago, my committee carried to the House of Delegates successfully a provision to eliminate that. That court has long since spent its usefulness. It would be our view that the existing caseload should be diverted either to one or two single courts rather than being dispersed among the existing courts of appeals, either to the Court of Appeals for the Federal Circuit or to the District Court for the District of Columbia.

If I may, I would like to comment also on a policy position that the House of Delegates took at the last term at the recommendation of my committee, and that is the increase in the amount of diversity jurisdiction from $10,000 to $50,000. That amount has remained constant since 1958. The progress of inflation has long since made the $10,000 item really almost negligible, and increasing it to $50,000 would barely carry it forward to the same level that it had been. I can comment that in 1958, when there was an increase in the jurisdictional amount, there was possibly—well, there was, in fact, a decrease of the caseload in the Federal courts of about 20 percent. The Administrative Office has done some calculations on the possible impact of this and, while they do not seem to be terribly persuasive, at least the ones that we saw on my committee, it would surely have a significant impact on the court's caseload and would be certainly desirable.

So, with that, Mr. Chairman, I again commend this committee for carrying forward these important reforms and would be pleased to respond to any questions you might have.

Senator HEFLIN. There has been some discussion today about this multiparty, multiforum jurisdiction for mass tort cases. Have you all taken a position on that?

Mr. LANDIS. We have not taken a position on that, Mr. Chairman. I may say that our committee has been looking at that. And, speaking purely for myself, and without attempting to reflect a policy position of the ABA, I think it is a desirable solution, the prospect of having a single Federal court being the point at which jurisdiction could be taken of that kind of mass tort. I emphasize it would be the single discreet mass tort, such as an airplane crash, that would be the traditional kind of thing that is highly desirable.

And then, as is customary in these multidistrict panel cases, the individual damage cases would then be shunted back to the particular district or court where they arose for disposition on damages grounds after a determination of liability in the district court where jurisdiction was lodged.

Senator HEFLIN. What does the existing law say on that type of thing? It has been a long time since I have practiced law, but one time, as I seem to remember, that if there was an airplane crash, there was a choice as to whether or not damages could be decided in the court that determined the liability, or go back to the State and have it tried there.

Mr. LANDIS. You determine which law applies and you complicate it further when you are dealing with the question of the damages, too, because there are variant applications of the principles of conflict of laws. But, in terms of shipping cases back and forth, under the practice of the multidistrict panels now, where you have cases consolidated for pretrial treatment, in a single—by the action of the multidistrict panel, the case will go to one court for disposition of all of the preliminary issues and it is a much more expeditious and efficient way of dealing with it. Then, after the cases are ready for trial, they go back to the point of origin for disposition there.

Senator HEFLIN. Well, thank you, sir. We appreciate your testimony. There may be some questions submitted in writing and, if so, we would appreciae your response.

Mr. LANDIS. Thank you for your invitation, Mr. Chairman.

[The statement of Robert M. Landis and a letter in response to a question from Senator Thurmond follow:]

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Statement of
ROBERT M. LANDIS
on behalf of the
AMERICAN BAR ASSOCIATION
before the
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
of the
UNITES STATES SENATE
on the subject of
S. 1482, THE JUDICIAL BRANCH IMPROVEMENTS ACT OF 1987

March 18, 1988

Mr. Chairman and Members of the Subcommittee:

I am Robert M. Landis, a trial lawyer from Philadelphia. I am the former chairman of the American Bar Association's Standing Committee on Federal Judicial Improvements and currently serve as a member of that Committee. I am pleased to appear before you today to express the views of the American Bar Association on the important package of court reform proposals which your subcommittee is now considering.

The operation of our justice system, though of vital importance to all our citizens in its protection of individual rights, and the adornment of our democratic system, lacks the drama which often infuses other aspects of our national life. Yet, it is the bastion of our society.

The American Bar Association commends you, Mr. Chairman and the Members of your Subcommittee, for your dedicated efforts to improve the justice system.

These hearings are yet another example of the thoughtful and constructive approach to the betterment of the justice system that characterizes the work of your Subcommittee. Many of the proposals in the bill are just the kind of carefully-drawn refinements which are needed to move us yet closer to our objective of a fair and efficient system which ensures equal justice under the law.

Let me now turn to the specific provisions of S. 1482 and share with you the Association's views on those proposals on which we have adopted policy.

Title I -- Mandatory Jurisdiction of Supreme Court

This title would substantially eliminate the mandatory appellate jurisdiction of the Supreme Court. The ABA strongly supports this proposal, which would permit the Supreme Court to focus its attention on those matters most deserving review.

In February, 1979, our House of Delegates adopted the following resolution on this subject:

> Be It Resolved, that the American Bar Association approves and supports the adoption by the Congress of legislation to abolish obligatory Supreme Court review by appeal, as distinguished from discretionary review by certiorari, of all matters now reviewable by appeal, except for appeals from determinations by three-judge courts."

Appeals in the federal system, including appeals to the Supreme Court, are not mandated by the Constitution. As stated in Heike v. United States, 217 U.S. 427, 428 (1910), "... an 'appeal' to any Federal appellate court, including the Supreme Court, is solely a creature of legislative choice." The Constitution only obligates the Court to consider properly-perfected appeals on their merits, and access to the Court by certiorari is entirely sufficient from a constitutional perspective.

All cases came to the Supreme Court by appeal during the first century of its existence. However, since 1891 the Court's obligatory jurisdiction has been steadily narrowed. It was calculated that in the 1983 term, there were 3850 cases on the Courts' discretionary docket and only 210 cases on its obligatory (appeal) docket. While the appeals cases constituted only about five per cent of the court's caseload, these cases have taken a disproportionate share of the Court's time, time which could better be devoted to the significant constitutional and other matters which the court is petitioned to review. The merits of many of the cases which the court must consider on the appeal docket do not rise to the level of many of the cases on the certiorari docket.

There are other problems with the obligatory appellate jurisdiction. It is unclear what precedential weight should be accorded the summary dispositions which are frequently made of such appeals. The existence of dual avenues of appeal can create a question of the appropriate procedure for seeking review in a given case and result in the filing of both an appeal and a petition for a writ of certiorari.

It must be emphasized that adoption of legislation to eliminate mandatory appeals will not deprive any litigant of access to the Court. In fact, the Court would have greater opportunity to consider the truly significant and worthy cases. There is no public policy consideration which should cause the preservation of the present mandates for appellate review, except in those few instances involving decisions of three-judge federal courts, which otherwise would not be reviewable in any other appellate court. We strongly support the enactment of Title I of the bill.

Title III -- Court-Annexed Arbitration

Sections 301-305 collectively authorize an experimental program of court-annexed arbitration in each federal judicial district. The ABA has not adopted a specific policy on this particular proposal. However, the ABA has historically supported a variety of alternative methods of dispute resolution, including those annexed to courts.

The ABA's 1976 Report of the Pound Conference Follow-up Task Force suggested the potential benefit of compulsory arbitration in federal courts, governed either by a national or by individual local rules. Furthermore, as the ABA has expressed on a number of occasions in the context of amendments to the Rules Enabling Act, Congress clearly has the authority to promulgate rules governing court-annexed arbitration. Such authority should be delegated to the Judicial Conference for the purpose of managing this experiment. Thus, the framework proposed in Title III is sound and appears well-suited to continue the useful experimentation with court-annexed arbitration in the federal courts.

Title VI -- Miscellaneous Provisions

Many of the miscellaneous provisions of this title are ones which our Association has not previously examined. We have referred these proposals to appropriate entities within the Association for their review and will notify your Subcommittee promptly of any policy positions which are developed as a result of those reviews.

With respect to those provisions where the Association has adopted policy, I offer the following observations:

Section 610 -- Judicial Disqualifications

This section modifies the automatic disqualification provisions in 28 U.S.C. §455 to permit a judge to weigh the public interest in completing the litigation in determining whether to recuse himself or herself and also to permit a waiver of disqualification. This provision is consistent with ABA policy adopted in August 1987 which urges the relaxation of federal judicial recusal statutes.

Our policy provides that a judge need not disqualify him or herself because the judge or a member of his or her family is a member of a class in a class action unless they have a financial interest that could be substantially affected by the outcome of the litigation. Permitting a judge to avoid recusal where he or she has only a *de mimimis* financial interest in the outcome of a case is a relatively modest proposal that should not be controversial and should solve many of the problems that have arisen under Section 455.

Section 614 -- Judicial Immunity

As ABA witnesses testified before this Committee last month, the Association supports amendments to 42 U.S.C. §1988 proposed in this section to preclude awards of attorneys fees against judges in the same instance where a judge could not be required to pay other money damages as a consequence of a lawsuit. The Association further urges Congress to remove the threat of injunctions against judges, except in certain circumstances for the performance of acts within their judicial capacities.

Our proposal embodied in S. 1515, introduced by Chairman Heflin, would reverse the Supreme Court's decision in Pulliam v. Allen, 456 U.S. 522, holding for the first time that a judicial officer might be subjected to a suit for injunctive relief and that attendant counsel fees might be awarded to the prevailing plaintiff. The ABA urges that, as a matter of principle, the statutory underpinning for this decision, 42 U.S.C. §1983 and §1988, be amended to preclude this direct threat to the independence of both the state and federal judiciary.

Section 616 -- Improvement of the Appeals Process with Respect to Arbitration

Section 616 of the bill amends the U.S. Arbitration Act to permit an appeal where the effect of the court order favors litigation over arbitration or where a final decision with respect to arbitration is involved. Subsection (b) would not permit an appeal of an interlocutory order favoring arbitration over litigation. This reform of federal arbitration procedure was originally proposed by the American Bar Association and supported by the Judicial Conference.

Under present doctrine, appeals from orders concerning arbitration depend on the final judgment rule and rely on archaic distinctions arising from the earlier separation of law and equity. The courts have struggled with these problems for a long time so that legislative relief is essential.

We enthusiastically support these provisions of the bill.

Section 623 -- Temporary Emergency Court of Appeals

This Section provides for the phasing out of the Temporary Emergency Court of Appeals, or "TECA."

In February 1985, the House of Delegates of the American Bar Association approved a resolution calling for the abolition of TECA. The primary reason for the ABA's action was that, with an average annual caseload of only 37 cases since its creation in 1972, TECA simply is unnecessary. We also have a long-standing skepticism about the utility of specialized Article III Courts, absent a specific showing that judges of the federal district and appeals courts are not in a position to handle particular disputes. When TECA and its predecessor, the Emergency Court of Appeals, were created, Congress intended that there be a single body able to develop the expertise for uniform and expeditious resolution of particular kinds of cases. However, there is no evidence to suggest that any other Article III court could not undertake these responsibilities today.

Section 623, abolishing TECA, provides two main options for. the new forum for the remaining TECA cases--transferring currently pending and future cases which otherwise would have been sent to TECA to either the various U.S. Courts of Appeals or to the Court of Appeals for the Federal Circuit. While we oppose a transfer to the various Circuit Courts, it is our view that a more clear and simple transition following the abolition of TECA might result if all of its cases are simply referred to a single existing court of appeals such as the Court of Appeals for the District of Columbia Circuit or the Federal Circuit Court of Appeals. This is consistent with the action of our House of Delegates in suggesting that in any future establishment by Congress of emergency economic control programs, if there is a decision to provide for appeals of those laws to a single court, then it would be our preference that they simply be handled by an existing appellate court.

Section 624 -- Judicial Cost-of-Living Increases

The ABA supports repeal of §140 of P.L. 97-92, which bans all judicial salary increases unless specifically authorized by Congress. This provision has effectively, and we believe unfairly, blocked all automatic cost-of-living adjustments for federal judges.

Other Issues

Before closing, I would like to take a few moments to raise some issues in the court reform area on which the Association has adopted policy and to suggest that the Subcommittee may want to consider these issues in the context of this legislation.

State Justice Institute

The State Justice Institute officially opened for business 18 months ago when the Board of Directors of the Institute was sworn in. In the intervening period, the Institute has become fully operational--a well-trained, lean staff was hired and over three hundred concept papers for its first round of grants were evaluated and resulted in 32 projects receiving $2.8 million in grants. The Institute quickly has filled the void that this Subcommittee had identified when you brought the SJI to life--a non-profit entity devoted to research and demonstration projects for the support and strengthening of state and local courts.

Against this background, we support the prompt reauthorization of the SJI, which requires such action before next October 1. The proposed four-year reauthorization of the SJI would permit the kind of continuity usually recommended for programs working to strengthen our justice system. Furthermore, an authorized spending level just $5 million a year above the current level would permit a continued strong partnership with the states. For instance, during the SJI's first round of grant awards, 35 states, Puerto Rico and the District of Columbia had their court systems or other entities participate in SJI funded activities. After the most recent decisions, that number is well over 40. The SJI has helped to remind us all that some 97% of all cases filed in this country are not filed in federal courts. Thus, the state and local judiciary is the justice system in America, and one this Institute has already helped. While this legislation would be a logical addition to S. 1482, which amendment we support, we wish primarily to highlight the importance of reauthorization, rather than a preferred vehicle.

Federal Jurisdiction Reform

The Association has had a long-standing policy position in opposition to the elimination of diversity jurisdiction and to the curtailment of resident plaintiff jurisdiction, on the principal grounds that the alternative federal forum provides a means for out-of-state litigants to avoid or minimize local prejudice in certain cases.

The Association, however, agrees that the jurisdictional amount is too low and needs to be increased. At our Midyear Meeting in February 1987, our House of Delegates voted to urge Congress to amend 28 U.S.C. §1332 to provide that the amount in controversy must exceed $50,000. The current figure of $10,000, fixed in

1958, has been badly eroded by inflation. An amount of approximately $36,000 would be required simply to bring us back, in real dollars, to the 1958 level.

Voir Dire

The ABA also endorses legislation to afford parties and their counsel the right to participate in the voir dire examination of prospective jurors in federal criminal and civil cases. We believe that this would not unduly lengthen the jury selection process but would help ensure fairness in the adjudication of matters in the federal courts.

Peremptory Challenge of Judges

Finally, the ABA urges changes in the mechanism for disqualifying judges. Our policy would permit the peremptory challenge of a federal judge, magistrate or bankruptcy judge in civil cases and criminal cases. Fairness and the appearance of impartiality favor applying peremptory disqualification procedures in both civil and criminal proceedings.

In conclusion, I again commend you, Mr. Chairman, and your Subcommittee for your stalwart efforts on behalf of the nation's court system. We hope and trust the views we have conveyed here today will assist you in moving this constructive legislation forward.

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April 15, 1988

Honorable Howell Heflin
Chairman
Subcommittee on Courts and
  Administrative Practice
Committee on the Judiciary
223 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Heflin:

Thank you for sending me Senator Thurmond's question on the impact of relaxation of the recusal standards on current and future litigation before the federal courts.

Although there are case reports and some anecdotal reports on recusals, there are no definitive statistics that would afford a firm basis for assessing the impact of relaxing recusal standards on litigation in the federal courts. It is a fair inference, however, that modifying the automatic disqualification provisions as provided in Section 610 of Title VI of S.1482 would avoid disqualification in certain instances and would therefore contribute to expediting case handling by the courts.

Sincerely,

Robert M. Landis

RML:dgk

Senator **HEFLIN**. Thank you. We stand adjourned.

[Whereupon, at 12:05 p.m., the subcommittee adjourned.]

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